1953 *Present :* **Rose C.J. and Pulle J.**

H. SEDARAHAMY *et al.*, Appellants, *and* K. ABUBUCKER *et al.*, Respondents

S. C. 151–152—D. C. Colombo, 3,223/LA

Res judicata—*Partition action—Sole defendant—Agreement by plaintiff to pre-pay costs before a given date—Dismissal of action for default—Legal effect of the dismissal.*

In a partition action instituted by A. as sole plaintiff against B. as sole defendant, B. claimed the entirety of the corpus without conceding any share to A. The action was, however, dismissed because the plaintiff had committed a breach of an agreement to pre-pay certain costs before a given date. Thereupon A. filed another partition action in respect of the identical land.

Held, that the dismissal of the first action determined once for all B.'s title to the entirety of the land as against A. A. was not entitled, in the second action, to agitate the same question of title as was in issue in the previous action.

Held further, that the transfer by B. of the entire land to C. during the pendency of the second action was valid.

APPEALS from a judgment of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *W. Wimalachandra*, for the 5th defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the 3rd and 4th defendants appellants.

M. H. A. Aziz, with *M. H. M. Naina Marikar*, for the 1st and 2nd defendants respondents.

Cur. adv. vult.

December 13, 1953. PULLE J.—

There are two appeals in this case. The appellant in the first appeal is the 5th defendant and the appellants in the second are the 3rd and 4th defendants. The contest giving rise to these appeals relates to the apportionment of a sum of Rs. 9,625 awarded as compensation in respect of the acquisition by the Crown of a land called Koraborakele described as Lot 1 in Preliminary Plan No. A. 2,543. The 1st and 2nd defendants claimed the entirety of the compensation on the footing of a conveyance of that lot to them by the 5th defendant dated the 27th February, 1947, and marked 1D 1. They alleged that the 5th defendant was the owner of the entirety of the land. It was common ground that before her conveyance 1D 1 the 5th defendant was entitled under a chain of deeds to 7/8ths of the land. The case for the 1st and 2nd defendants was that the 5th defendant had acquired title by prescriptive possession to the balance 1/8th also.

The 5th defendant took up the entirely unconscionable position that 1D 1 amounted to only a conveyance of her undivided 7/8ths share, even though it purported to convey the whole, and that it was void because at the date of its execution there was pending a partition suit No. 4,561 of the District Court of Colombo in respect of the identical land. The 3rd defendant claimed the balance 1/8th on certain deeds. If in fact the 5th defendant was, at the time 1D 1 was executed, entitled to no more than 7/8ths it was conceded that the title to the remaining 1/8th was in the 3rd defendant.

The principal issues tried in the case under appeal were whether the 5th defendant had at the date of 1D 1 acquired a title by prescriptive possession to the 1/8th in dispute and whether the decree in a previous partition suit between the 3rd and 5th defendants enured to the benefit of the 1st and 2nd defendants. The learned Judge answered the former issue against the appellants and the latter in their favour.

The facts material to the question of prescriptive possession are as follows. One Giran Appu was the original owner of the land which on his death passed to his widow and eight children. In 1922 the 5th defendant acquired the interests of the widow and four children amounting to 12/16ths and in 1929 she acquired the interests of two other children amounting to 2/16ths thus making a total of 7/8ths. In 1931 she leased a 3/4ths share for four years to the 1st defendant according to whom the balance 1/4th was possessed by the 5th defendant.

On 31st December, 1943, the 3rd defendant instituted D. C. Colombo Case No. 3,175/P to partition the land in question. The sole defendant was the present 5th defendant. The latter claimed in her answer the entirety of the land and asked that the action be dismissed. She specifically pleaded that the 3rd defendant at no time held the land in common with her and that she had acquired a prescriptive title by possession for over twenty years. The decree is 1D 5 according to which the action was dismissed with costs on the 7th June, 1946, because the plaintiff had committed a breach of an agreement to pre-pay certain costs. The 3rd defendant promptly filed another partition action No. 4,561. The plaint bears the date 21st June, 1946. As stated earlier the 5th defendant by

1D 1 dated the 27th February, 1947, transferred all her right, title and interest in the property to the 1st and 2nd defendants. She filed her answer 1D 6 in case No. 4,561 on the 30th March, 1949, stating in effect that she was the sole owner and that she had conveyed all her interests to the 1st and 2nd defendants.

Did the 1st and 2nd defendants obtain on 1D 1 a transfer of title from the 5th defendant to the entirety of the land ? The answer depends on whether between 1929 when the 5th defendant bought the shares of two of the children of Giran Appu and 1947 the date of 1D 1 she had acquired title by prescriptive possession to the 2/16ths shares belonging to Charles and John, the sons of Giran Appu and on the legal effect of the decree in case No. 3,175.

Assuming that the 5th defendant was in exclusive occupation and enjoyment of the whole land since 1929 it is not possible from this bare fact to infer that she had acquired title to the additional 2/16ths. There was nothing in the character of the occupation and enjoyment which would lead one to presume that there was an ouster of the co-owners at a point of time from which adverse possession could be reckoned. The well known cases on the acquisition by prescriptive possession of the title of a co-owner are reviewed by Howard C.J. in *Sideris et al. v. Simon* [1] who says at p. 276,

" It may be conceded that the possession from 1904 to 1942 was long continued, undisturbed and uninterrupted. But this is not enough. What other circumstances existed leading to the presumption that there was an ouster ? ". The learned Chief Justice then proceeded to deal with three deeds executed by one set of co-owners and held that they were not sufficient " to initiate a prescriptive title and put an end to the co-owners' possession ".

In my opinion in so far as the learned Judge found in favour of the 1st and 2nd defendants on the ground that the 5th defendant had by her acts of possession acquired a prescriptive title it cannot be supported. We then have to consider the question whether the dismissal of action No. 3,175 so operated as to give the 5th defendant title to the share which she disputed with the 3rd defendant in that case. Of the cases cited at the resumed hearing on the 9th October, 1953, *Saramappuhamy v. Martinahami et al.* [2] is of considerable assistance. It was there decided that where a partition suit was dismissed on the ground that the defendant had acquired title by prescription, then in a subsequent action brought by the defendant to vindicate title to the land the judgment in the partition suit operated as *res judicata* and prevented the parties from again raising the question of title. In the partition suit which was under consideration in *Saramappuhamy v. Martinahami et. al.* [2] the defendant set up a claim that he was entitled to the entirety of the land sought to be partitioned and after an investigation of title the defendant succeeded and the action was dismissed. In case No. 3,175/P the 5th defendant in the present case was the sole defendant and the 3rd defendant was the sole plaintiff. The issue between them was plain and straightforward, whether the 3rd defendant was entitled to any share at all having regard

[1] *(1946) 46 N. L. R. 273.* [2] *(1910) 12 N. L. R. 102.*

to the claim set up by the 5th defendant that she was entitled to the whole land. Does it make any difference that the 3rd defendant agreed to have the action dismissed in the event of costs being not paid before a given date? In my opinion the answer must be in the negative. The dismissal of that action determined once for all the 5th defendant's title to the entirety of the land as against the 3rd defendant and thereafter, unfettered by any legal proceedings by the 3rd defendant to agitate the same question of title *inter partes* as was in issue in case No. 3,175/P, the 5th defendant was in a position to convey a good title to the entirety of the land to the 1st and 2nd defendants. I have considered the decisions in *Sanchi Appu v. Jeeris Appu* [1] and *Abeysundera v. Babuna et al.* [2] which were cited to support the argument for the appellants that the dismissal of case No. 3,175/P was not a bar to the institution of case No. 4,561/P. In the former case a decree dismissing a partition action was pleaded as *res judicata* in a subsequent action *rei vindicatio*. Ennis J. was of the opinion that the plea failed because there was no adjudication of title on the merits in the dispute between the plaintiff and the 37th defendant in the partition case. He said,

"The plaintiff, who sought to partition, failed because he could not establish his own title and the Judge further remarked that his proper action would have been a *rei vindicatio* action, in view of the fact that he was aware that the thirty-seventh and fortieth defendants were contesting his title. So far as we are aware in this case, there is nothing to show that the thirty-seventh defendant in the partition action adduced any evidence at all in support of his title. It is impossible, therefore, to say that the decision in that partition action was relative between the plaintiff and the thirty-seventh defendant."

In the present case after the two parties had filed their pleadings and after the trial had been fixed the 3rd defendant expressly invited the Court upon a named contingency to adjudicate on his claim without evidence. I do not think he can now be heard to say that there was no investigation of the dispute between him and the 5th defendant.

The case of *Abeysundera v. Babuna et al.* [2] does not help the appellants. In that case the earlier partition action had been dismissed before the day fixed for trial and even before some of the defendants had been served with notice of the action. The resulting position was that one could not say what the points of contest were between the parties.

As stated earlier, in the present case one knows exactly the nature of the dispute between the 3rd and 5th defendants in case No. 3,175. The pleadings do not speak with an uncertain voice as to the legal consequences flowing from an adjudication dismissing that action, namely, that as against the 3rd defendant the 5th defendant had vindicated title to the entirety of the land.

I would dismiss the two appeals with costs. The 1st and 2nd defendants will be entitled to only one set of costs of appeal.

ROSE C.J.—I agree.

Appeals dismissed.

[1] *(1920) 22 N. L. R. 176.*

[2] *(1925) 26 N. L. R. 459.*