1909.
April 20.

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

SARAM APPUHAMY *v.* MARTINAHAMI *et al.*

D. C., Negombo, 7,118.

Res judicata—*Judgment in partition suit—Action* rei vindicatio—*Civil Procedure Code, s. 207.*

Where a partition suit was dismissed on the ground that the defendant had acquired title by prescription to the land, and where the defendant subsequently brought an action to vindicate his title to the land pleading the judgment in the partition suit as *res judicata* on the question of title,—

Held, the judgment in the partition suit operated as *res judicata*, and prevented the parties from raising the question of title again.

Fernando v. Menikrala [1] referred to and distinguished.

APPEAL by the plaintiff from a judgment of the District Judge (R. W. Byrde, Esq.). The facts are fully set out in the judgment of Wendt J.

H. A. Jayewardene, for the plaintiff, appellant.

F. M. de Saram, for the defendants, respondents.

Cur. adv. vult.

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The plaintiff, alleging that Don Peduru was on certain specified deeds the owner of an undivided three-fourths of a parcel of land,

[1] *(1902) 5 N. L. R. 369.*

avers that upwards of forty years ago the land was divided, and that ever since Don Peduru possessed exclusively the southern three-fourths. The plaintiff then claims title to this southern block by conveyance dated 1903 from Peduru's widow (first defendant) and only child, and alleges prescriptive possession by himself and his predecessors in title. He specially pleads that in case No. 6,619 second defendant (sister of first defendant) sued plaintiff and first defendant and others for a partition of the land, claiming a share in it; that present plaintiff asserted his exclusive title to the southern block, and that the Court decided that plaintiff was so entitled, and thereupon dismissed the action. Plaintiff accordingly pleads that his title is *res judicata* against the defendants. The defendants in answer deny the steps of plaintiff's title, and deny that the former decree estops them.

The issue agreed upon and tried was whether "the defendants were barred by the judgment in case No. 6,619 from setting up any claim to the land in question," meaning, of course, the southern block claimed by plaintiff. The learned District Judge answered this issue in the negative.

"The dismissal of the partition action," he said, "cannot possibly be construed as a decree in favour of the present plaintiff. It confers no right upon him against the second defendant, and much less against the first defendant. The Court merely refused to grant a partition. It gave no absolute judgment on the respective rights of the various parties in the land. Under case D. C., Kegalla, 1,168 (*Fernando v. Menikrala* [1]) it was held that the dismissal of an action for partition was no bar to the subsequent institution of an action by the plaintiff. This being so, it clearly cannot be pleaded as *res judicata*, so as to deprive the present defendants of their right of defence." Now it is trite law that in a partition action the plaintiffs (and each party is practically plaintiff in respect of the interest he claims) must prove not only their common ownership *inter se*, but also a good title as against all others, because the effect of a decree of partition is to confer an absolute title. Hence a partition suit may fail, in spite of proof of the parties' common ownership *inter se*, if the Court is not satisfied that the parties collectively have a good title to the land. Take an instance. A professing to own a block of forest land conveys an undivided half to B, who thereupon brings a partition suit to have the land divided. As between A and B they are clearly entitled to a moiety each. But the land is forest, and presumably Crown property under the Ordinance No. 12 of 1840, and the Court therefore requires proof rebutting the presumption. Such proof not being produced, the action must be dismissed. All that the case of *Fernando v. Menikrala* decided, as I understand it, is that if this latter ground is the reason of the dimissal, without adjudication on the parties' rights *inter se*, the dismissal will not be

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a bar to an ordinary action for a declaration of title. It did not decide that if the Court on the evidence held that as between themselves A and B in the illustration I gave were owners in equal shares, but refused a partition for want of proof that both together were absolutely entitled against all the world, neither party could afterwards rely on the express judicial determination of their rights as estopping the other from litigating the title over again. The learned District Judge, in my opinion, does not correctly state the scope of the judgment in case No. 6,619. It discussed exhaustively the title of the parties before the Court, and said not a word implying that any person not joined was entitled to any interest. On the contrary, it proceeds on the basis that the parties amongst them are absolutely entitled as against the world, but coming to their rights *inter se* expressly holds that tenth defendant (present plaintiff) and his predecessors in title has been in the exclusive possession of the divided three-fourths in question for some forty years. The action for partition was therefore dismissed, because as amongst the parties to the suit (present defendants being two of them) the Court found the present plaintiff to be the exclusive owner of the land described in the present plaint. The question of title was undoubtedly in issue in that action, and section 207 of the Civil Procedure Code constitutes the title as then declared a *res judicata*, which cannot be litigated afresh amongst the parties.

In my opinion the appeal must be allowed and judgment entered declaring plaintiff entitled to the land, and ordering that defendants be ejected therefrom. Plaintiff's estimate of his annual profits is not traversed, and he will therefore have Rs. 100 as damages accrued up to this date, together with a further sum reckoned at the rate of Rs. 60 per annum from this date until he is given possession. The defendants will pay plaintiff's costs in both Courts.

HUTCHINSON C.J.—I concur.

Appeal allowed.