1926.

Present : Garvin A.C.J. and Dalton J.

BULNER *v.* RAJAPAKSE *et al.*

293—D. C. Kegalla, 6,913.

Partition—Sale after interlocutory decree—Abatement of action—Subsequent sale of same interest—Ordinance No. 10 of 1863, s. 17.

A partition action proceeded to the stage of an interlocutory decree which was entered in March, 1911. In May, 1911, as none of the parties had taken steps to procure the issue of a commission for partition, the Court made the following order: "No commission issued. Lay over."

By deed dated January 31, 1919, the defendant purchased certain shares of the land belonging to a party to the action.

On March 6, 1924, on an application made to withdraw the action the court passed the following order: "This action was laid by on May 24, 1911. No steps have been taken since that date to prosecute the action. Action abated."

By deed dated March, April, and June, 1926, the plaintiff purchased the same interests that had been conveyed to the defendant in 1919.

Held, that the defendant's deed being obnoxious to section 17 of the Partition Ordinance the plaintiff's title, which was obtained after the order of abatement, prevailed.

APPEAL from an order of the District Judge of Kegalla.

Keuneman, for plaintiff, appellant.

Hayley (with *Soertsz*), for defendant, respondent.

July 7, 1926. GARVIN A.C.J.—

This is a partition action. The contest is between the plaintiff and the fourth defendant. Each of them claims to have acquired the interests of one Setie, who was admittedly entitled to 6/32 of the land. Setie is dead. She left her surviving three children, Ukku, Opalangu, and Meniki. Opalangu died leaving two children, Hapu and Appuwa. Meniki, another child of Setie, died leaving one child, Mallandu. The defendant by a deed dated January 31, 1919, purchased the interests of Ukku (the sole surviving child of Setie) and of Hapu, Appuwa, and Mallandu, the children of Opalangu and Meniki. By deeds P 3, P 4, and P 5, all executed in 1924, and dated March 24, April 28, and June 16, respectively, the plaintiff purchased from Ukku, Hapu, and Mallandu. He has obtained no transfer from Appuwa, but he claims, nevertheless, to be vested with

the interests of all the heirs of Setie. This land was the subject of another partition action, No. 3,013, instituted in the same District Court. The action proceeded to the stage of interlocutory decree declaring the shares in which the parties were entitled to the land and decreeing a partition thereof. That decree was entered on March 2, 1911. On May 24, 1911, as none of the parties had taken steps to procure the issue of the commission for the purpose of carrying out the partition, the Court made the following order: "No commission issued. Lay over." On July 14 of the same year, the Proctor for the fourth to the eighth defendants, who had been awarded costs against the plaintiff, filed a bill of costs and moved for notice of taxation. The bill was taxed on September 21, 1911, and writ for the recovery for the cost thus taxed was issued. The costs were recovered, and a payment order was issued on December 19, 1911. On February 14, 1913, the plaintiff applied to withdraw his documents, and was allowed to do so. There was no further step taken in the action till March 6, 1924, when an application was made on behalf of the plaintiff to withdraw the action. Upon this application the District Judge made the following order: "This action was laid by on May 24, 1911. No steps have been taken since that date to prosecute the action. Action abated."

The learned District Judge who heard the matter now under appeal held that the order of May 24, 1911, was in effect a refusal by the Court to grant the application for the partition of this land within the meaning of section 17 of the Partition Ordinance, and for that reason rejected the plaintiff's contention that the deeds in favour of the fourth defendant were ineffective to pass any title to him in that they had been executed during the pendency of a partition action. The order of March 6, 1924, is in terms an order of abatement. No steps having been taken since 1911, the Court decided that the case was one in which such an order should be entered, and has done so. But I cannot assent to the view that the order to "Lay over" made on March 2, 1911, could possibly be regarded as an order of abatement. It is not so in terms; steps have been taken in the action subsequent thereto, and it was thought necessary in 1924 to enter a formal order of abatement. It would seem, therefore, that the fourth defendant's claim is based upon a transfer which was made after the institution of partition action No. 3,013 and before that action abated as the result of an order made under section 402 of the Civil Procedure Code. It is contended, however, that inasmuch as no steps had been taken in that partition action since the middle of 1911 it cannot be regarded as a pending action in 1919, when the plaintiff took his transfer. The case of *Lawaris v. Kirihamy* [1] is relied upon as an authority for the proposition that the prohibition created by section 17 of the alienation of undivided interests is only

[1] *3 Bal. Notes of Cases 38.*

1926.

GARVIN A.C.J.

Bulner v. Rajapakse

effective where the partition action is alive and being actively prosecuted. Counsel is seeking to avail himself of the contention that a *lis pendens*, if it is to be an effective bar to the alienation of interests of parties to the action, must consist of an action which has been actively and constantly prosecuted. But what is relied upon as a bar to the plaintiff's action is not the ordinary rule of *lis pendens*, but the express provisions of section 17 of the Partition Ordinance. The section is as follows:—

> " Whenever any legal proceedings shall be instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share therein unless and until the court before which the same were instituted shall by its decree in the matter have refused to grant the application for such partition or sale, as the case may be, and any such alienation or hypothecation shall be void."

This prohibition is not to have effect merely during the pendency of the legal proceedings but unless and until the Court has refused the application. The language of the section has given rise to much controversy, but its meaning has now been definitely settled by decisions of this Court. The prohibition against alienation created by this section commences to operate when a proceeding for partition has been instituted and continues in cases where partition is decreed until the final decree for partition has been entered and where a sale has been decreed until the issue of a certificate of sale. The section in terms states that the prohibition continues " unless and until the court before which the same were instituted shall by its decree in the matter have refused to grant the application. " In the case of *Babiyala v. Nando*,[1] the Court, which consisted of three Judges, had before it a case which in all material particulars was identical with the one now under consideration. The case of *Lawaris v. Kirihamy* (*supra*) was brought to its notice. Ennis J., who delivered the principal judgment, differentiated that case on the ground that the decision was based on other considerations, but in the course of his judgment he made the following observations which are pertinent to the observation in *Lawaris v. Kirihamy* (*supra*): " If then the Court can refuse to grant the application at any time before final decree, the terms of section 17 of the Ordinance prohibit any alienation till then and declare any such alienation void. In the circumstances I do not see any room for the application of the rule of law that an action not actively and constantly prosecuted is no longer pending. " So far as the claim of the 4th defendant is concerned, it is beyond question that the transfers on which he relies were made after the institution of the partition proceedings and before the Court had by its decree

[1] *(1915) 18 N. L. R. 370.*

in the matter refused to grant the partition or sale. It is, however, urged by counsel for the fourth defendant that the plaintiff is in the same situation. He contends that though the transfers upon which the plaintiff relies for his title were executed after the order of abatement of March, 1924, was entered, they are nevertheless obnoxious to section 17, in that the Court had not by its decree in the matter refused to grant the partition. The submission is that an order of abatement is not a decree by which the Court refuses a partition within the meaning of section 17. The Partition Ordinance, No. 10 of 1863, was enacted long before the Civil Procedure Code. It may fairly be assumed that the Legislature did not there contemplate orders of abatement for want of active prosecution which Courts were empowered to enter by section 402 of the Civil Procedure Code. The decree which is contemplated by section 17 is a decree which amounts to a refusal of the partition or sale. It has, however, been held that the provisions of section 402 of the Civil Procedure Code are applicable to the case of a partition action. See *Peiris v. Perera*,[1] where Bonser C.J. observed that where an interlocutory decree has been made and has not been proceeded with, section 402 of the Civil Procedure Code should be applied by the Court and its rolls cleared of the action. This decision was approved in *Allahakoon v. Wickremesinghe*.[2] In the case of *Babiyala v. Nando* (*supra*) the Court on the invitation of counsel for the respondent considered whether in the circumstances of that case an order of abatement *nunc pro tunc* should be made. It was decided not to do so, but there is sufficient indication that the Judge thought that an order of abatement may be entered in a partition case. But is an order of abatement such a decree? If the order does amount to a refusal of the partition or sale, it may fairly be urged that it is within the terms of the section. Now the order proceeds upon the inference of a want of diligence on the part of the plaintiff which arises from the fact that no step in the action has been taken for a year, and it is liable to be set aside by the Court which made it upon application made within a reasonable time and upon sufficient grounds. It is a bar to the further prosecution of the action, but it is a bar which may be removed. These are considerations which lend great weight to the submission of counsel for the respondent.

But an order of abatement does amount to a final determination of the action when upon application to set it aside the Court refuses to do so. The same effect may be claimed for it when a reasonable time has elapsed since the making of the order and no action has been taken to set it aside.

In the case before us the plaintiff took no steps in the action for nearly thirteen years. The order of abatement entered thereafter on March 4, 1924, was made upon the application of the plaintiff for a

[1] *(1896) 1 N. L. R. 362.*

[2] *4 A. C. R. 8.*

1926.

GARVIN A.C.J.

Bulner v. Rajapakse

dismissal of the action. Since then over two years have elapsed. Under the circumstances the effect of a decree finally terminating a partition action may, I think, be claimed for the order, and that effect may be claimed for it as at the date on which it was made. The failure to take steps to set it aside within a reasonable time gives rise to the inference that the order was well founded and no reason for setting it aside existed. I am content to rest my decision in this case on the ground indicated above, and uphold the title of the plaintiff.

The appeal in this case is allowed. Judgment will be entered for the plaintiff for the interests acquired by him. The plaintiff has not obtained a conveyance from Appuwa, and must make out a title to that share before he can be declared entitled to it.

The plaintiff is entitled to costs, both here and in the Court below.

DALTON J.—

This appeal arises out of a partition action, the plaintiff claiming 6/32 shares of the land in question on three deeds of March 24, April 28, and June 16, 1924.

There had been a previous partition action instituted in 1910 in respect of the same land in which there was a preliminary decree in March, 1911. Thereafter nothing further appears to have been done by the parties in that action. As they failed to deposit survey fees and to issue a commission for partition, on May 24, 1911, the District Judge made the following order: " No commission issued. Lay over." Then, on March 13, 1913, the owners of the 6/32 shares purported to convey by deed D 13 their interests in the land the subject of the partition action to one Kira. Kira's heirs in 1924 conveyed those interests to the present fourth defendant.

Then, on March 6, 1924, nearly eleven years after the last proceeding in the partition action, the Proctor for the plaintiff therein moved to withdraw the case, with liberty to institute a fresh action if necessary. Upon that motion the District Judge made the following order: " This action was laid by on May 24, 1911. No steps have been taken since that date to prosecute action. Action abated."

Thereafter, the present plaintiff (appellant) obtained from Ukku, Happu, and Mallandu, three of the four grantors under the deed D 13, on the three dates already set out (P 3, P 4, and P 5), their interests in the 6/31 of the land, *i.e.*, 5/32 shares. It is urged on his behalf that the deed D 13, being an alienation of the land subject to a partition action during the pendency of that action, is void under the provisions of section 17 of the Partition Ordinance, 1863.

The trial Judge held that the order " No commission issued. Lay over " of May 24, 1911, was in effect a termination of the original partition action. I am quite unable to agree with him, and on appeal counsel for the respondent has been unable to support that

holding. In addition, the trial Judge held that the provisions of the Civil Procedure Code with regard to abatement of actions do not apply to partition actions. Past practice approved of by this Court has been to the contrary, and it was not questioned on appeal that that practice was correct. The argument of both parties addressed to us was on the basis that these provisions of the Code did apply to partition actions. No doubt it is possible to conceive in some cases a very difficult position and difficult questions arising as the result of an order being made under the provisions of section 402 of the Civil Procedure Code in a partition action.

In *Babiyala v. Nando* (*supra*) the facts were very similar to the facts in this case, save that there none of the plaintiff's predecessors in title were parties to the partition action, whilst the time which elapsed between the interlocutory order and the purchase by the plaintiff was even longer than in this appeal. There the Court held that the plaintiff's deed was void as against section 17 of the Partition Ordinance. They further refused to make an order for abatement *nunc pro tunc*, as asked on behalf of the plaintiff. They considered the decision of de Sampayo J. in *Lawaris v. Kirihamy* (*supra*), but do not appear to have taken the same view. De Sampayo J. in referring to the partition action there says: " The action was never proceeded with, no steps having been taken by the fourth defendant to reconstitute it, and it died a natural death." He holds on the facts that it had been abandoned by the plaintiff and the plaintiff's legal representative, the fourth defendant referred to. Hence, presumably the latter party could not reconstitute it or plead that the action was still pending although no party thereto had taken any steps to obtain an order of abatement. He continues: " Now, after more than ten years, the institution of the action is put forward as invalidating all alienations thereafter. In my opinion a partition action in order to have that effect must be alive under circumstances similar to those applicable to a case of *lis pendens*. If this were an ordinary question of *lis pendens*, I should say that the action not being actively and constantly prosecuted was no longer pending." Finally he states: " The fourth defendant was content to have her rights decided in this case on their merits, and her whole attitude confirms me in the opinion that the previous partition action was abandoned and cannot be considered to have the effect of invalidating the alienations made on that footing." The reason for the decision would appear to be an abandonment of the action, as clearly established by the facts.

The question of *lis pendens* during the period between the order of abatement and the setting aside of such an order is dealt with in *Cooray v. Perera* [1] when the Court (Wood Renton C.J. and de Sampayo J., Pereira J. dissenting) held that the action cannot be held as

[1] *17 N. L. R. 460.*

1926.

DALTON J.

Bulner v. Rajapakse

having been *lis pendens* during that interval. Pereira J. expressed his opinion strongly to the contrary, but it does not seem to me in any case material here, for there has in fact been no setting aside of the order of abatement, and it would certainly seem that it could not be set aside now, the time that has elapsed not being "reasonable" within the meaning of section 403. I am unable to see, therefore, under the circumstances here that on any footing there can be a *lis pendens* subsequent to March 6, 1924. It is of interest also to note that Pereira J. took part in the case of *Babiyala v. Nando* (*supra*) and was prepared to assent to the order made by the Court in that case, being only prevented from signing the judgment by illness.

I am of opinion, therefore, that the deed D 13 was void under section 17 of the Partition Ordinance, and that the plaintiff was entitled to the declaration he sought in respect of 5/32 shares of the land and to an order for partition as prayed. The judgment of the trial Judge should be set aside, judgment being entered for the plaintiff as denoted above, with costs. This appeal is therefore allowed, with costs.

Appeal allowed.