1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

MARSHAL PERERA *and* 2 others, Appellants, *and* ELIZABETH FERNANDO *and* 27 others, Respondents

*S. C. 230 (Inty.)—D. C. Kalutara, 26,715*

*Partition action—Is it an action for " recovery " of property ?—Civil Procedure Code—Sections 403 and 547—Applicability of section 547 to partition actions—Abatement of a partition action—Consequences of such abatement.*

An action for partition of land belonging to the estate of a deceased person is not necessarily, though it might often be, an action to which section 547 of the Civil Procedure Code applies. When objection under that section is taken, the question to be decided is whether the real or substantial purpose of the action is to determine questions of title. If such be the case, the proper course is to afford to the plaintiff an opportunity of obtaining probate or letters of administration.

Where, in a partition action, there is no dispute by any defendant or intervenient as to the title as stated in the plaint, an order of abatement entered under section 403 of the Civil Procedure Code will not bar the successors in title of the plaintiff (assuming that section 403 does apply to successors in title) from instituting a fresh action for partition.

APPEAL from a judgment of the District Court, Kalutara.

*Walter Jayawardene*, with *J. V. M. Fernando* and *Neville Wijeratne*, for the plaintiffs-appellants.

*Sir Lalita Rajapakse, Q.C.*, with *J. A. D. de Silva*, for the defendants-respondents.

*Cur. adv. vult.*

[1] *(1948) 50 N. L. R. 233.*

December 18, 1956. H. N. G. FERNANDO, J.—

After interlocutory decree had been entered in this action for partition, the learned District Judge dismissed the action upon two grounds :—

(1) that the father of the plaintiffs having died leaving an estate which required administration, this action is not maintainable until probate or letters of administration have been issued to the executor or administrator of the deceased ;

(2) that a former action for the partition of the same land instituted by the father of the plaintiffs having abated, section 403 of the Civil Procedure Code is a bar to the institution of the present action.

Upon the valuations of the land in dispute, both in the present action and in the former one, there were admissions that the value of the deceased father's interest in this land alone was over Rs. 2,500, and the proctor for the plaintiffs in the lower Court did not apparently contest the matter of value ; we are therefore not disposed to consider favourably the submission made to us with respect to that matter by counsel for the plaintiffs. His principal submission, however, has been that section 547 does not apply to the present action, which is not an action " for the recovery of property belonging to or included in the estate of the deceased ". *Ponnamma v. Arumugam*[1], decided by the Privy Council, was an action for partition, or alternatively for a sale of certain parts of an intestate estate. The widow and the son of the deceased, purporting to act under his oral directions, had proceeded to divide the immovable property among the heirs, and conveyances were executed accordingly ; the heirs themselves had dealt with some of the portions allotted to them. When one of the heirs instituted the action in question, this Court decided in appeal that " it would be wrong in every sense of the term to disturb the division " (which was considered to have been honestly made), " to say nothing of the conveyances and encumbrances which have supervened ". The Privy Council affirmed the decision but for a different reason. Their Lordships held that the action fell within the scope of section 547. The principal argument against the applicability of the section was that it did not prevent the maintenance of an action for partition. As I interpret the judgment, their Lordships did not reject this argument, and decided only that the action in question " though in form an action for partition only, is for the recovery of property " ; the plaintiff was " seeking to recover her share as one of her father's heirs in the property which has been irregularly alienated in favour of the other heirs ". They observed also that the intestate's estate " was not in condition for partition ", and that before partition could take place " the plaintiffs would require to re-create the inheritance ". The investigations made by the Privy Council into the purposes of the action and into the " condition " of the property to which it related, as well as many of the observations in the judgment, were irrelevant and even misleading if the true intent of the

[1] *(1905) 8 N. L. R. 223.*

decision was to uphold the simple proposition that "an action for partition of land belonging to the estate of a deceased person is an action for the recovery of property within the meaning of section 547". I should emphasize also that, for the purpose of barring the present action, the proposition would have to commence thus :—

> "an action for partition of land, shares in which are property belonging . . . .".

Wood Renton J. in *Hassen Hadjiar v. Marikar* [1] expressed the view that that action (which was for partition) was not one for the "recovery of property" and did not understand the Privy Council to have held that every partition action came within the scope of those words. There is nothing in the judgment of Garvin S.P.J. in *de Silva v. Juwa* [2] to indicate that in his opinion "a proceeding between co-owners, the purpose of which is resolve their respective interests in common into holdings in severalty" was a proceeding for the "recovery of property", although he did observe that in too large a percentage of cases, actions for partition are in reality actions for declaration of title.

The true position would seem to be that an action for partition is not necessarily, though it might often be, an action to which section 547 applies. So that when objections under that section is taken, the question to be decided is whether the real or substantial purpose of the action is to determine questions of title. If such be the case, the proper course, as approved by this Court in *Hassen Hadjiar v. Marikar* [1] and *Gooneratne v. Hamine* [3], is to afford to the plaintiffs an opportunity of obtaining administration. Reference to the pleadings in the present case and to the judgment which preceded the entry of the interlocutory decree show that the purpose of the action went far beyond the division of the common land; the objection was therefore sound but not fatal to the action.

As to the second ground of dismissal, namely, that an earlier action for partition of the same land instituted by the father of the present plaintiffs had abated, it was assumed, both in the lower Court and by Counsel and ourselves at the hearing of the appeal, that if the present action involved the same "cause of action" section 403 would be a bar. It was only at the time of the preparation of this judgment that I read the observations of Gratiaen J., in *Soothiratnam v. Annamma* [4] which, although made *obiter*, may support the contrary view that section 403 "primarily affects only the plaintiff (in the abated action) or his legal representative". As that contrary view was not in any way suggested to us at the hearing of the present appeal, which in any event can be determined on other grounds, I shall assume for present purposes that the section does operate even against successors in title of the plaintiff in an action which had abated. Any observations which may follow concerning the position of such successors in title must therefore be taken as being founded on that assumption and not as an expression of opinion that section 403 does in law affect such successors.

[1] *(1912) 15 N. L. R. 275, 280.*
[2] *(1935) 37 N. L. R. 165.*
[3] *(1903) 7 N. L. R. 299.*
[4] *(1954) 57 N. L. R. 515*

In *de Silva v. Juwa*[1] Garvin J. held that the abatement of an action *rei vindicatio* is a bar to the institution of an action for partition in respect of the same land *where the same question of title is involved.* He found that the " cause of action " in the earlier proceedings was the denial by the defendant in that action of the right of the plaintiff to any interest in the land. At the stage therefore of the same defendant's intervention in the second (partition) action, the identical question of title arose immediately for determination, and the cause of action in the second suit was the same as in the first one. In the partition suit (No. 22,670 D. C. Kalutara) which had preceded the present action, there was no dispute by any defendant or intervenient as to the title as stated in the plaint; though the title has been disputed in the course of the present (second) action, the same question of title was not a " cause of action " involved in the earlier suit. That suit was in the strict sense one brought in the exercise of the right of any co-owner to compel the partition of land owned in common. The Partition Ordinance does not render it essential for the plaintiff to prove in such a suit that common possession is inconvenient, nor have the Courts held that inconvenience of possession must be established. The Ordinance presupposes an inherent right in any person who is for the time being a co-owner to secure a divided holding for himself or else, in appropriate circumstances, to obtain his proportionate share in the proceeds of sale of the land. If, therefore, any notion of a " cause of action " is involved in a partition suit *pure and simple*, it is this inherent right of a co-owner for the time being which constitutes the " cause of action ".

The decision of this Court in *Muttucumarasamy v. Sathasivam*[2] affirmed earlier decisions to the effect that an order of abatement can properly be made in a partition action and we see no reason to doubt the correctness of those decisions. But what are the consequences of such an order of abatement ? Garvin, A.C.J., in *Bulner v. Rajapakse*[3] held that, if an order of abatement is not set aside upon application made in that behalf, or if no action to set aside the order is taken within a reasonable time after it is made, the order does amount to a final determination of the action. But the " final determination " can in reason be effective only to bar a fresh action in respect of questions disputed though not pursued to a decision and which must therefore be taken to have been determined against the plaintiff.

The " cause of action ", if any, which became barred by reason of the abatement of action No. 22,670 was only the *inherent right of the plaintiff in that action to compel a partition.* That plaintiff himself could probably not have sought to exercise that right again unless the order of abatement had first been set aside. But in the present (second) action the " cause of action " is the inherent right of the present plaintiffs, and not that of their father, which is the basis of their claim for a partition; and section 403 (even if it does apply to successors in title) does not disqualify the plaintiffs. No question of title having been involved in the first action, there is not here present the element which, in my opinion,

[1] *(1935) 37 N. L. R. 165.*

[2] *(1951) 53 N. L. R. 97.* [3] *(1926) 28 N. L. R. 260.*

was decisive in the case of *de Silva v. Juwa*[1], namely, that the *title* of the plaintiff had been disputed in the earlier action, and was again sought to be agitated by what was *in form only* an action for partition.

In his dissenting judgment in *Muttucumarasamy v. Sathasivam*[2] Basnayake J., as he then was, appeared to have thought that orders of abatement made in partition actions can lead to absurdity:— "Once an action abates under Chapter XXV, no fresh action shall be brought on the same cause of action. Must then the co-owners for all time hold in common the property in respect of which the action abated was instituted?". He had perhaps assumed, as we do (but without so deciding), that section 403 operates against successors in title. But even if that assumption be correct, the suggested absurdity does not, in my opinion, arise, because the consequences which can in any event flow from the abatement *of a partition action pure and simple* are limited. The co-owners (excluding, of course, the original plaintiff) will not for all time be prevented from securing interests in severalty, and can secure those interests by virtue of their inherent rights as co-owners, although they may be precluded from re-opening any dispute as to the *title* of any predecessor which was a "cause of action" involved in the suit which had abated.

For these reasons we think that the learned District Judge erred in holding that the abatement of action No. 22,670 was a bar to the present action. The decree of dismissal is therefore set aside, and the action will be laid by pending proceedings for administration of the Estate of the father of the plaintiffs. In the circumstances we would award to the plaintiffs half the costs of this appeal.

T. S. FERNANDO, J.—I agree.

*Decree set aside.*