

1970 Present : H. N. G. Fernando, C.J., and Silva, J.

K. CHELLAPPAH, Appellant, and S. SELLADURAI and 14 others, Respondents

S. C. 108/68 (Inty.)—D. C. Point Pedro, 8407/P

*Partition action—Withdrawal of it by the plaintiff—Right of a defendant or his successor in title to institute a fresh action—Res judicata—Scope of Civil Procedure Code, s. 406.*

In 1946 the plaintiff in a partition action was allowed by the Court to withdraw the action with liberty to file a fresh action, provided that costs were paid in terms of the order. In fact those costs were paid. In November 1964 the present action for a partition of the same land was instituted by the successor in title of the 2nd defendant in the former action; the defendants in the present action were persons who were either parties to the former action or successors in title of those parties.

*Held*, that the proceedings and decree in the former action could not operate as *res judicata* or as a bar to the claims of the present plaintiff and/or the successors in title of the plaintiff in the former action. Section 406 of the Civil Procedure Code could not preclude the institution of the present action.

**A**PPEAL from an order of the District Court, Point Pedro.

S. Sharvananda, for the plaintiff-appellant.

C. Ranganathan, Q.C., with K. Thevarajah, for the 3rd, 6th, 9th and 11th-15th defendants-respondents.

*Cur. adv. vult.*

October 24, 1970. H. N. G. FERNANDO, C.J.—

In 1946 one Velu Sinnathamby filed an action for a partition of a land and there were 13 defendants to that action. In the plaint, Sinnathamby had conceded to the 2nd defendant a certain share in the land. That defendant did not file answer, but some of the defendants filed answers denying that Sinnathamby or the 2nd defendant had any interest in the land.

On 22nd April, 1948 Sinnathamby was allowed to withdraw the action upon the following order made by the Court :—

“At this stage plaintiff withdraws his action with liberty to file a fresh action paying costs Rs. 150 to 4th, 9th, 11th defendants and Rs. 100 to the 3rd, 6th, 7th and 13th defendants and these costs are to be paid by the plaintiff or his successors in title to this land, before filing a fresh action for partition in respect of this land.

Plaintiff's action is dismissed subject to these terms. Enter decree accordingly.”

In November 1964 the present action for a partition of the same land was instituted by the present plaintiff, who is a successor in title of the 2nd defendant in the former action ; the defendants to the present action are persons who were either parties to the former action or successors in title of those parties. A preliminary issue raised at the trial was whether the proceedings and decree in the former action operate as *res judicata* or as a bar to the claims of the present plaintiff and/or the successors in title of Sinnathamby. This appeal is against the order of the District Judge answering that issue in the affirmative.

It will be seen that the order of 22nd April 1948 reserved a right to Sinnathamby to file a fresh action, provided costs were paid in terms of that order. In fact those costs were paid and accordingly Sinnathamby or his successors in title could have brought a fresh action. But the learned District Judge has held that since the 2nd defendant in the former action did not reserve for himself the right to bring a fresh action, his successor the present plaintiff does not have that right.

The former action was instituted under the old Partition Ordinance, which did not contain a provision authorising the continuance of a partition action in a case where the plaintiff who instituted the action failed to proceed with it. That being so the second defendant in the former action could not continue with that action when Sinnathamby proposed to withdraw it. In any event, s. 406 of the Code does not debar *a defendant* in an action which is withdrawn from instituting a fresh action upon

the same cause. There was no adjudication in the former action as to the rights of the former 2nd defendant, and thus the decree dismissing that action cannot operate as *res judicata* in respect of those rights.

The learned trial Judge has relied upon the judgment *Kandavanam v. Kandaswamy*<sup>1</sup> (57 N. L. R. 241). In that case the plaintiff in a partition action averred that a land was owned in common exclusively by the plaintiff and a named defendant B. C then intervened and claimed a share of the land. Thereupon the plaintiff, with the consent of B, withdrew the action, and it was dismissed with costs in favour of C. When the successors of B subsequently instituted a partition action in respect of the same land, this Court held that since B had consented to the unconditional withdrawal of the former action, his successors were precluded from asserting that C has no interest to the land. In so holding, Gratiaen J. emphasized two matters, firstly that B had consented to the withdrawal of the action, secondly that the action was withdrawn without liberty to institute a fresh action. The facts of the present case are quite different, because here the former 2nd defendant did not consent to the withdrawal, and liberty was reserved to bring a fresh action. Even if, as Counsel has argued, the former 2nd defendant may be treated as a co-plaintiff and be thus placed in the same position as the former plaintiff, there are two clear reasons why the 2nd defendant and his successors are not precluded from bringing the present action. Firstly, if a plaintiff reserves the liberty to bring a fresh action, then his co-plaintiffs must also enjoy that liberty. Secondly, sub-section (3) of s. 406 expressly prevents a Court from permitting the withdrawal of an action without the consent of co-plaintiffs; since the former 2nd defendant did not consent to the withdrawal of the former action, then, even if it had been withdrawn without the liberty to file a fresh action, s. 406 does not preclude the institution of a fresh action by the 2nd defendant or his successors.

For these reasons the order of the learned District Judge on issue No. 21 is reversed and the decree dismissing the plaintiff's present action is set aside. The appeal is allowed with costs in both Courts, and the action will proceed on the other issues which were framed at the trial.

SILVA, J.—I agree.

*Appeal allowed.*

<sup>1</sup> (1955) 57 N.L.R. 241.