1955 *Present :* Gratiaen, J., and Swan, J.

M. KANDAVANAM *et al.*, Appellants, *and* V. KANDASWAMY, *et al.*, Respondents

S. C. 293—D. C. Point Pedro, 3,955

Civil Procedure—Claim by a defendant against a co-defendant for substantive relief—Jurisdiction of Court to entertain it.

Res judicata—*Partition action—Withdrawal of action—Consent by some of the defendants—Failure to obtain leave to institute fresh action—Effect on rights of parties in a subsequent action—Civil Procedure Code, ss. 207, 406.*

(i) The Civil Procedure Code does not empower a Court to entertain substantive claims for relief preferred by defendants *inter se*. Therefore, if A sues B for declaration of title to certain property and makes C, a co-owner, a party defendant in order to ensure a more complete and effectual adjudication of the issues arising in the action, C cannot, while supporting A's allegations against B, ask for a declaration of rights and an award of damages on his own account against B.

(ii) A instituted action No. 1 for the partition of a land on the basis that it was exclusively owned in common, from a common source of title, by him and the defendants one of whom was B. C intervened claiming for himself an undivided 2/9 share of the land. A decided to avoid a contest on the issue of C's claim. He obtained, with B's consent, permission from the Court to "withdraw the action" but did not ask for liberty to institute a fresh action. Accordingly, the trial Judge entered a decree dismissing A's action with costs in favour of C.

About a year later the successors-in-title of B instituted action No. 2 against C in respect of the identical land claiming declaration of title to the 2/9 share which C had claimed in action No. 1. A was also joined in action No. 2 as a defendant in order to ensure a more complete and effectual adjudication of the issues arising in the action.

Held, (*a*) that the failure of A to obtain liberty under section 406 of the Civil Procedure Code to bring fresh proceedings at the time when he "withdrew" from the partition action (Action No. 1) was fatal to any fresh attempt by A to reagitate a claim which came into conflict with C's title to an undivided 2/9 share.

(*b*) that the plaintiffs in action No. 2, being privies of B who had consented to the unconditional withdrawal of action No. 1, were also precluded from asserting that the title which had passed to them from B prevailed over the title of C.

APPEAL from a judgment of the District Court, Point Pedro.

C. Thiagalingam, Q.C., with *V. Arulambalam* and *C. Chellappah*, for the 1st and 2nd defendants appellants.

E. G. Wikramanayake, Q.C., with *A. Nagendra*, for the plaintiffs respondents.

H. W. Tambiah, with *A. Nagendra*, for the 3rd and 4th defendants respondents.

Cur. adv. vult.

2——J. N. B 53181-1,592 (2/56)

October 28, 1955. GRATIAEN, J.—

The plaintiffs sued the 1st and 2nd defendants in this action for a declaration of title to an "undivided 18 lachams share" of a defined allotment of land, 37 lachams in extent. This allotment had originally formed part of a larger land called Thaddanthoddam (47 lachams in extent) out of which two small portions had passed into the possession of third parties by purchase. According to the plaintiffs, the entire 37 lachams allotment to which this action relates belonged to themselves, the 3rd and 4th defendants in the proportions of 18, 11, and 8 respectively. They alleged that the 1st and 2nd defendants, who had no title to the land, obstructed their possession as co-owners on 10th December 1950. Accordingly, they claimed, in addition to a declaratory decree in respect of their title on this basis, an order for the ejectment of the 1st and 2nd defendants and damages. The 3rd and 4th defendants were joined in the action in order to ensure a more complete and effectual adjudication of the issues arising in the litigation.

The 1st and 2nd defendants are husband and wife. She disclaimed any share in the land on her own account. The 1st defendant, on the other hand, claimed to be the owner by inheritance of an undivided 2/9 share; according to him, the collective rights of co-ownership asserted by the plaintiffs and the 3rd and 4th defendants must be restricted to the balance 7/9 share. On this basis, he repudiated the allegation that he and his wife were trespassers, and resisted the claims for ejectment and damages.

The 3rd and 4th defendants file a joint answer supporting the plaintiffs' allegation that the 1st defendant had no share in the 37 lachams allotment. They too asked for a declaration of their respective rights and an award of damages on their own account against the 1st and 2nd defendants. These latter claims should, of course, have been rejected by the learned Judge *ex mero motu*. The Civil Procedure Code does not empower a Court to entertain substantive claims for relief preferred by defendants *inter se*. It is no doubt permissible, and sometimes necessary, to adjudicate upon competing claims of one set of defendants against the other, but only in so far as would enable the Court to determine whether the relief asked for by the plaintiff (or against him upon a claim in reconvention) ought to be granted. *Fernando v. Fernando* [1] and *Banda v. Banda* [2]. But the formal decree cannot award substantive relief except in favour of the plaintiff or against him. Accordingly, the claim of the 3rd and 4th defendants for a declaration of title and for damages against the 1st and 2nd defendants could only have been entertained in separate proceedings. The question of stamp duty is also involved. These objections go beyond a complaint of mere irregularity. I would therefore hold that the Court had no jurisdiction to enter a decree granting substantive relief to either the 3rd or the 4th defendant against the 1st and 2nd defendants.

[1] *(1939) 41 N. L. R. 208.*

[2] *(1941) 42 N. L. R. 475.*

With regard to the plaintiffs' claim against the 1st and 2nd defendants, the learned Judge decided, upon his assessment of the oral and documentary evidence, that they had established their joint right to an undivided 18 lachams share of the land and that the outstanding shares belonged exclusively to the 3rd and 4th defendants in the proportions set out in the plaint. It follows that in his opinion the 1st defendant and his wife, being trespassers, were liable to be ejected at the instance of the plaintiffs.

The judgment on questions of fact is not completely free of misdirection, but I do not consider the errors complained of to be sufficiently substantial to justify our reaching an opposite conclusion. In my opinion, however, the learned Judge wrongly rejected the objection that the plaintiffs were precluded in law from asserting any title which came into conflict with the 1st defendant's title to a 2/9 share.

The 1st defendant's plea, which is equivalent to a plea of *res judicata*, was based on the outcome of an earlier litigation in which he, the present 3rd defendant, a man named Ramalingam, (who is the predecessor in title of the present plaintiffs) and certain others were parties. In order to avoid confusion I propose, in setting out the relevant details of those proceedings, to describe the parties to those earlier proceedings by reference to their respective designations in the present litigation.

On 21st December 1948 the 3rd defendant instituted an action for the partition of this identical land in accordance with a chain of title which coincides precisely with that on which he and the plaintiffs now rely. His plaint specifically averred that "no other persons (had) any right or interest in the land sought to be partitioned". Ramalingam entered an appearance and obtained permission to file his answer, if necessary, after the completion of the preliminary survey. In due course, the 1st defendant intervened and objected to a partition on the basis asked for by the present 3rd defendant. He was accordingly added as a party defendant, and filed an answer claiming an undivided 2/9 share upon a title precisely similar to that which he asserts in the present action.

The nature of the dispute arising for adjudication between the present 3rd defendant and the present 1st defendant in that earlier litigation was perfectly clear: the crucial issue was whether the 1st defendant had title to an undivided 2/9 share, and was to that extent entitled to object to a partition on the basis that the land was exclusively owned in common by the 3rd defendant and other members of the group claiming title from a common source. But the 3rd defendant decided to avoid a contest on this issue. He obtained, *with Ramalingam's consent*, permission from the Court to "withdraw the action", but did not ask for liberty to institute a fresh action. Accordingly, the trial Judge entered a decree on 20th October 1949 dismissing the 3rd defendant's action with costs in favour of the present 1st defendant.

The present plaintiffs and the 4th defendant admittedly had no interests in the land prior to 20th October 1949. Very shortly afterwards, however, a number of transactions took place. On 1st March 1950, Ramalingam purchased an undivided share which the 3rd defendant

had previously allocated to A. Vallipuram (a party to the partition action belonging to the same group as himself). A few months later Ramalingam, by a series of conveyances, parted with all his undivided interests in the property : vide P21 in favour of the 1st plaintiff, P22 in favour of the 2nd plaintiff, and P23 in favour of the 4th defendant. The 4th defendant also purchased "2 undivided lachams" from the 3rd defendant.

It will be observed that all the interests previously claimed by the 3rd defendant have now been allotted by the plaintiffs either to the 3rd defendant himself or to the 4th defendant by virtue of purchases completed subsequent to the date of the decree in the partition action. Similarly, all the interests previously allotted by the 3rd defendant to Ramalingam and to Vallipuram are now alleged to have passed either to the plaintiffs or to the 4th defendant. On the other hand, the 1st defendant asserted in both proceedings that he had legal title to an undivided 2/9 share, but did not dispute on either occasion that the balance 7/9 share was held by the competing group. In other words, he concedes that the entirety of this balance 7/9 share belongs to the plaintiffs, the 3rd defendant and the 4th defendant in the proportions 18 : 11 : 8. The scope of the dispute in both proceedings was therefore identical.

The present action commenced on 22nd February 1951. The plaintiffs and the 4th defendant, as successors in title to Ramalingam, are admittedly his privies. The 4th defendant is, for the same reason, a privy of the 3rd defendant from whom he purchased a part of the title previously asserted by the 3rd defendant.

As there had been no formal adjudication in the earlier action regarding these competing claims, the doctrine of *res judicata*, in the strict sense of the term, does not apply. What then was the effect of the "withdrawal" of that action by the 3rd defendant with Ramalingam's consent, and of the consequential decree entered by the Court dismissing his claim for a partition of the land to the exclusion of the 1st defendant ?

The 3rd defendant "withdrew" from the partition action under the provisions of section 406 of the Civil Procedure Code which (notwithstanding certain doubts expressed in former times) is now recognised as being applicable to actions for the partition of property. As the Judicial Committee of the Privy Council observed in *Ponnammah v. Arumugam* [1], such an action, "though in form an action for partition, is for the recovery of land".

Section 406 is in the following terms :—

"406. (1) If, at any time after the institution of the action, the Court is satisfied on the application of the plaintiff (*a*) that the action must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

[1] (1905) 8 *N. L. R.* 223 at 226.

(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

(3) Nothing in this section shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others."

The underlying principle must be examined in the light of the express injunction contained in section 207 that "no plaintiff shall hereafter be non-suited". In former days, both here and in England, a plaintiff who found that his case was going, or was even likely to go, against him could elect to be nonsuited. By this simple device, he reserved to himself the right to harass his opponent all over again by instituting another action relating to the same dispute. In order to remedy this mischief, Order 41 Rule 6 of the Rules of the Supreme Court, 1875, of England was introduced whereby :

"any judgment of non-suit, unless the Court or Judge otherwise directs, *shall have the same effect as a judgment upon the merits for the defendant.*"

Rule 6 was later superseded by Order 26 Rule 1 relating to the 'discontinuance" of actions, but it has been authoritatively decided that the new Rule places the same fetters upon litigants. The true principle is that "after a plaintiff has proceeded with his action to a certain point and brought the defendant face to face with him, he is not then entitled to escape the determination of the issue by a side door. He is no longer *dominus litis*. The Judge then has the power of saying whether the action shall be discontinued or not . . . . ." and "when a plaintiff has gone on to such a point that he has brought his adversary face to face with him, it is only by the leave of the Judge that he can withdraw so as to have the power of bringing a fresh action for the same cause." *Fox v. Star Newspapers* (1898) 1 Q. B. 636 C. A., affirmed by the House of Lords in (1900) A. C. 19., where Lord Halsbury observed, "When a cause once comes into Court, and where the plaintiff offers no support to his action, there must be a verdict for the defendant."

Section 406 of our Code, read with the words of prohibition in section 207, has achieved the same result in this country. "The policy is that an action once instituted must be prosecuted until it is determined by a judgment upon the matter in dispute, and a plaintiff who withdraws from an action or abandons part of his claim will not be permitted to bring a fresh action for the same matter or in respect of the same part, unless he does so with the permission of the Court which may be granted when it appears (*a*) that the action must fail by reason of some formal defect or (*b*) that there are sufficient grounds for permitting the plaintiff to withdraw from the action or to abandon part of his claim." per Garvin J. in *Annamalay Chetty v. Thornhill*[1]. Indeed, the Court's power to grant liberty to institute fresh proceedings is itself strictly limited, being

[1] *(1932) 34 N. L. R. 381 at 385.*

conditional upon a judicial decision, based on proper material, that one or other of the alternative situations (*a*) and (*b*) does in fact exist.

The 1st defendant's contention is that the failure of the 3rd defendant to obtain liberty under section 406 (1) to bring fresh proceedings at the time when he "withdrew" from the earlier action is fatal to any fresh attempt by the 3rd defendant or his privy the 4th defendant to reagitate a claim which comes into conflict with the 1st defendant's title to an undivided 2/9 share; and that the plaintiffs, being privies of Ramalingam *who had consented to the withdrawal of that action without "liberty to reinstitute"*, are equally precluded from asserting that the title which has passed to them from Ramalingam prevails over the title of the 1st defendant.

We were referred by Counsel to certain earlier decisions which have been enumerated in a footnote A [1]. Some were directly concerned with the application of the doctrine of *res judicata* to partition actions. In my opinion, the true principle is no longer in doubt. Every decree for partition involves a determination that each person found to be a co-owner had established a title which was good against the whole world. But in particular cases disputes also arise as to the merits of competing claims between parties *inter se*. It therefore follows that a plea of *res judicata* arising in connection with a decree entered *after adjudication* in a partition action must always be answered by examination of the particular matters in issue which had actually been decided. If, therefore, an action had been dismissed on the merits in view of an adjudication as to a particular point of contest, that adjudication certainly operates as *res judicata*. On the other hand the order of dismissal may proceed from other grounds—e.g., because the parties had failed to establish a title sufficient to justify a decree *in rem*. In that event, the rule of *res judicata* would probably not apply.

But what if the plaintiff in a partition action (after the pleadings have raised a specific point of contest as to the validity of his claim to have the land partitioned on a basis inconsistent with the title asserted by one of the defendants) avoids the contest by withdrawing unconditionally from the action? In such an event the particular issue which was raised by the defendant would in my opinion constitute the "matter" which the plaintiff is precluded by section 406 (2) from reagitating in the course of subsequent litigation against the same adversary. If the plaintiff proposes, in spite of his withdrawal, to "live to fight another

[1] *Footnote A :—*

Fernando v. Menikrala (1902) 5 N. L. R. 369.
Palaniappa Chetty v. Gomes et al. (1908) 11 N. L. R. 322.
Saram Appuhamy v. Martinahami et al. (1909) 12 N. L. R. 102.
Saram v. Martinahamy et al. (1909) 2 Leader L. R. 156.
De Silva v. De Silva (1916) 3 C. W. R. 318.
Sanchi Appu v. Jeeris Appu (1920) 22 N. L. R. 176.
Perera v. Punchirala (1920) 2 C. L. Rec. 58.
Fernando v. Perera (1923) 25 N. L. R. 197.
Abeysundere v. Babuna et al. (1925) 26 N. L. R. 459.
Sinniah v. Eliakutty (1932) 34 N. L. R. 37.
De Silva v. Juwa (1935) 37 N. L. R. 165.
Kanapathipillai v. Kandiah (1942) 44 N. L. R. 42.
Sockalingam Chetty v. Kalimuttu Chetty (1943) 44 N. L. R. 330.
Nadarajah v. Paththakuddy (1951) 53 N. L. R. 273.
Sedarahamy et al. v. Abubucker et al. (1953) 56 N. L. R. 83.

day", he must obtain the Court's permission under section 406 (1) to retain that privilege. If no such permission is granted, the statutory bar created by section 406 (2) comes into operation, and the withdrawal from the action has the same effect as a judgment upon the merits in favour of the contesting defendant in respect of the particular matter in dispute.

I am therefore satisfied that, in view of his withdrawal from the partition action which he had instituted, the 3rd defendant and his privy the 4th defendant are irrevocably precluded from asserting against the 1st defendant a title which is in any way inconsistent with the position that the 1st defendant was in truth a co-owner to the extent of an undivided 2/9 share.

There remains the question whether section 406 (2) also stands in the way of the plaintiffs' claim (as purchasers from Ramalingam) in opposition to the title previously asserted by the 1st defendant. To this I would reply that, just as the 3rd defendant's withdrawal "without liberty" had the effect of a judgment upon the merits in favour of the 1st defendant, the statutory bar equally operates against Ramalingam who consented to the withdrawal. The reason is that, if the earlier action had been dismissed on the merits in favour of the 1st defendant, the adjudication would necessarily also have involved a decision in his favour against Ramalingam. In that event the doctrine of *res judicata* between co-defendants, as laid down in *Fernando v. Fernando* (supra) and *Banda v. Banda* (supra) would have applied. In the case now under consideration, Ramalingam, by consenting to the 3rd defendant's action being withdrawn unconditionally, had in effect agreed to a result which was *as effective in law as a judgment on the merits* in favour of the 1st defendant on the matter in dispute between the 1st defendant, the 3rd defendant, and Ramalingam.

The issues arising for decision in the present action can now be answered. The plaintiffs are precluded from obtaining a declaration of title against the 1st defendant on the basis that they and the 3rd and 4th defendants are the only co-owners of the land in dispute, and the 1st defendant is entitled to a declaration against the plaintiffs (which will also bind the 3rd and 4th defendants) that he owns an undivided 2/9 share in the land. The plaintiffs are, however, entitled to a declaration that the balance undivided 7/9 share belongs to them and the 3rd and 4th defendants in the proportions 18 : 11 : 8 respectively. As the 1st defendant is a co-owner of the land, the decrees entered against him and his wife for ejectment and for damages, must be set aside. I would set aside the judgment under appeal and order a decree to be entered for a declaration of title in accordance with the decision which is summarised in this paragraph of my judgment. The plaintiffs and the 3rd and 4th defendants must pay the 1st and 2nd defendants their costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.