1969 *Present :* Sirimane, J., Samerawickrame, J., and Wijayatilake, J.

A. H. DINGIRI AMMA, Appellant, *and* R. A. W. D. APPUHAMY, Respondent

S. C. 62/67 (Inty.)—D. C. Kurunegala, 2176/P

Partition action—Non-appearance of plaintiff on trial date—Dismissal of action—Whether it debars institution of a second action—Res judicata—*Partition Act (Cap. 69), ss. 10, 12, 25, 29, 63, 66, 71, 76, 79—Civil Procedure Code, ss. 84, 85, 207, 403, 406, 547—Inapplicability of sections 84 and 85 in a partition action.*

Where a partition action is dismissed in terms of section 84 of the Civil Procedure Code on the ground of the non-appearance of the plaintiff on the trial date and without any adjudication on the plaintiff's rights, the order of dismissal would not operate as *res judicata* in a subsequent action brought by the plaintiff for partition of the same land.

Obiter : The provisions of Chapter 12 of the Civil Procedure Code relating to the consequences and cure of defaults in appearing have no application at all to a partition action instituted under the Partition Act.

APPEAL from an order of the District Court, Kurunegala.

E. A. G. de Silva, with *Ben Eliyatamby* and (*Miss*) *S. M. Senaratne*, for the 1st defendant-appellant.

W. D. Gunasekera, with *W. S. Weerasooria*, for the plaintiff-respondent.

Cur. adv. vult.

November 13, 1969. SIRIMANE, J.—

The plaintiff had filed an action No. S067 for the partition of a certain land on the footing that it originally belonged to one Mudiyanse, whose rights devolved on his daughters. He claimed that the rights of two of the daughters passed to him and the 2nd and the 3rd defendants, and those of the third daughter to the 1st defendant.

The 1st defendant filed a statement claiming the entire land on the footing that the two daughters from whom the plaintiff claimed had married in " diga " and inherited no rights to this land.

At the trial in the District Court, the plaintiff succeeded. In appeal, however, the case was sent back for re-trial. The plaintiff was absent on the trial date, and a Decree Nisi dismissing his action had been entered. The plaintiff then purged his default to the satisfaction of the trial Judge who restored the case to the trial roll. On an appeal by the 1st defendant that order, too, was set aside, and the Decree Nisi dismissing the action was made absolute.

The plaintiff thereafter filed this action for partition of the same land.

We cannot now interfere in any way with the order of dismissal in D.C. S067. But we have to consider what effect that order has on the present case.

A partition action is brought to put an end to the inconvenience of common possession. Apart from the special procedure prescribed for such actions, both in the Ordinance of 1863 and the Partition Act of 1951 (Chapter 69), such an action is very unlike any other action based on a " cause of action " as defined in the Civil Procedure Code. In the present action, like in all other actions for partition, whether filed under the Ordinance or the Act, the plaintiff avers in para. 14 of the plaint that common possession of the land is inconvenient and impracticable. That is the basis on which he comes to Court.

It is true that the title of a plaintiff is often challenged in whole or in part by the defendants. But the filing of a statement of claim raising a contest does not transform a partition action into an action for declaration of title. Such a statement does not, in my view, really affect the nature of the proceeding, which has to be ascertained by looking at the plaintiff's case as stated by him. He does not know, or is not expected to know, at the time he files the action, exactly what the defendants may say. Sometimes many contests are raised in the statements of claim, but one is only too familiar with the very large number of cases where such contests are given up at the trial. In my view there is no difference between a Partition Action, which is contested (before an adjudication on the contests) and one which is not. As far as the plaintiff is concerned, the basis on which he comes into Court is the inconvenience of common possession. It would be different, of course, if there had been an adjudication on the rights he claimed. I referred to this aspect of

the matter because Counsel for the appellant argued at some length that if a partition action is uncontested (a partition action "simpliciter" as he called it), then an order under section 84 of the Civil Procedure Code would not operate as res judicata, but, according to his submission, once a statement of claim is filed raising a contest, such an order would prevent the plaintiff from coming into court again, in view of section 207 of the Code.

I am in respectful agreement with Ennis, A.C.J. when he said in *Abeysundere v. Babuwa* [1],

> "Now clearly in a partition action the action itself is not founded upon a wrong. It is an action to give relief against the inconvenience of common possession, so that a partition action at its institution is not an action founded upon a cause of action as defined in section 5, but it would be an action under the definition of 'action' given in section 6. Section 207, if the limitation contained in the explanation be regarded as a limitation on the main words of the section, would not apply to partition actions, but there is no doubt that in partition actions a contest frequently arises between the parties with regard to the rights of parties and title generally, and with regard to which the parties seek redress, such a contest would be based on a cause of action as defined in section 5, and *the adjudication upon it* might well be *res judicata* under section 207."

He went on to say,

> "If one regards a partition action as an action founded on some cause, even if it be not such a cause as would fall within the definition in section 5 of the Civil Procedure Code, then the cause of action would seem to be a recurring one, that is, it is due to a continuance of the common ownership which exists from day to day as the inconvenience of common ownership recurs day by day."

The earlier case (D.C. 8067) was dismissed for want of appearance without any adjudication on the plaintiff's rights. That dismissal, in my view, is no bar to the present action, for the inconvenience of common ownership recurs day by day.

In the case of *Silva v. Juwa* [2] relied on by the appellant, the earlier action brought by the plaintiff was one for declaration of title to a land. Before the defendant intervened in the subsequent partition action, which the plaintiff filed, an order of abatement had been entered in the land case. The Court had to consider the effect of section 403 of the Civil Procedure Code and Garvin, S.P.J. said at page 166 :

> "This would, therefore, appear to be a fresh action in the sense that so far as the intervenient and the plaintiff are concerned this action was brought by the plaintiff as against the intervenient subsequent to the date of the order of abatement."

[1] *(1925) 26 N. L. R. 459.* [2] *(1935) 37 N. L. R. 165.*

It would appear from the facts of that case, that the second action was a mere subterfuge to circumvent the order of abatement. I think that case is distinguishable from the facts of the present case. In *Kandavanam v. Kandaswamy* [1] the Court again had to consider the effect of an *unconditional withdrawal* by the plaintiff of a partition action under section 406 of the Civil Procedure Code, in view of the statutory bar in section 406 (2) which precludes the plaintiff from bringing a fresh action in such circumstances. The facts there, too, were different from those in the present case, though, with great respect, I venture to think that the Court had gone too far when it held that a defendant who consented to the withdrawal of the action was also prevented from bringing a fresh action.

Jayewardene on Partition at page 107 refers to a case decided in 1920 (*Perera v. Punchirala* [2]) where it was doubted whether section 406 of the Code applied to partition actions.

Nor do I think that those cases, where it has been held that a partition action was one "for the recovery of property" for the purposes of administration required by section 547 of the Civil Procedure Code, can be regarded as authority for the proposition advanced for the appellant, that a partition action is no different from an action for declaration of title to land. Though, with great respect, I am unable to share the view expressed in *Herath v. The Attorney-General* [3] that the provisions of section 207 of the Civil Procedure Code apply *only to decrees entered under Chapter 20* of the Code, yet I think that the learned District Judge was right (this being a partition action) when he held that the order in the earlier case was no bar to the present action.

I have examined the question so far on the basis that an order under section 84 of the Civil Procedure Code is an appropriate order in a partition action.

But I must say, however, that I am very strongly of the view that the provisions of the Civil Procedure Code relating to the consequence and cure of defaults in appearing (Chapter 12) have no application at all to a partition action instituted under the Partition Act.

One consequence of the laws of inheritance obtaining in the Island is the common ownership of small parcels of land. This in turn leads to many disputes, often resulting in violence. The Partition Act was designed to enable a co-owner to put an end to this evil and obtain a *Decree in Rem*. At the same time the legislature has paid heed to the fact that a partition action, once instituted, must be prosecuted with reasonable diligence, not only because of the prohibition against alienation pending such actions, but also because the business of a court should

[1] *(1955) 57 N. L. R. 241.* [2] *(1920) 2 C. L. Rec. 58.*

[3] *(1958) 60 N. L. R. 193.*

not be hindered by a number of semi-animate actions pending on its roll. The Act, therefore, provides for the dismissal of an action for many defaults, for example, the failure to deposit survey fees (sections 10 and 29), the failure to comply with the requirements relating to declarations, summonses, notices, etc., at the commencement of the action (section 12), the failure to provide security (section 63), default in payment of costs (section 66) or *non-prosecution of the action* (section 71). But in every one of these instances, when the action is dismissed without an adjudication, section 76 provides that such a dismissal should not operate as a bar to the institution of another action.

Absence of a plaintiff without excuse on the trial date surely amounts to a failure to "diligently prosecute the action". One has to bear in mind that the procedure prescribed under the Act before a case is ready for trial is elaborate and expensive, and also that in a partition action every defendant is in the position of a plaintiff.

Section 71, therefore, provides that:

> "No partition action shall abate by reason of the non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the Court has endeavoured to compel the parties to bring the action to a termination, the Court may dismiss the action:
>
> Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action the Court may, by order, permit any defendant to prosecute that action and may substitute him as plaintiff for the purpose and may make such order as to costs as the Court may deem fit."

In my view, the above section provides for the procedure which is applicable when a plaintiff in a partition action is absent, and section 79 of the Partition Act, relied on by the appellant, which provides for a *casus omissus* has no application.

Even a cursory examination of sections 84 and 85 of the Civil Procedure Code would reveal their inapplicability in a partition action. Section 84, for instance, provides for the dismissal of the plaintiff's action if he fails to appear on a day fixed for the appearance and answer of a defendant. It is very common to find a large number of defendants in a partition case. They are never served with summons at one and the same time, and a case had to be called on several dates before this is done. A plaintiff would be in peril on every date that a defendant appears on summons.

Section 85 provides for the *ex parte* hearing of a case and the passing of a Decree Nisi if the defendant fails to appear on the day fixed for his appearance and answer. Such a procedure, in addition to being obviously impracticable in a partition case, would also be contrary to the provisions of section 25 of the Partition Act which require the

Court to examine the title of each party before entering an Interlocutory Decree. Even as far back as 1895, in *Wickramasekera v. Fernando* [1], it was shown that a Decree Nisi was altogether irregular in a partition action.

The appeal is dismissed with costs.

SAMERAWICKRAME, J.—I agree.

WIJAYATILAKE, J.—I agree.

Appeal dismissed.