Present : Ennis A.C.J. and Schneider J.

1925.

ABEYSUNDERA *v.* BABUNA *et al.*

226—D. C. Matara, 374.

Res judicata—*Dismissal of partition action for non-prosecution—Subsequent action for partition of same land—Civil Procedure Code, ss. 5, 6, and 207.*

The dismissal of a partition action for non-prosecution is no bar against a subsequent action for the partition of the same land.

The cause of action upon which a partition action is based is inconvenience of common ownership, which is a recurring one.

APPEAL from an order of the District Judge of Matara dismissing an action for partition on the ground that it was barred by a previous action for the partition of the same land.

[1] *(1906) 2 K. B. 119.*

[2] *(1912) 15 N. L. R. 311.*

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It appeared from a certified copy of the proceedings of the previous action, produced by counsel, that the action had been dismissed before the day of trial had been fixed, and even before some of the defendants had been served with notice.

Samarawickreme (with him *H. V. Perera*), for plaintiff, appellant.

R. L. Bartholemeusz, for 26th defendant, respondent.

February 17, 1925. ENNIS A.C.J.—

This is an appeal by a plaintiff in a partition action, whose action has been dismissed with costs. The difficulties on appeal arise from the neglect to observe regular procedure. The learned Judge decided the shares of each of the parties to the action and allotted a definite share to the plaintiff, but on a plea that the plaintiff's action was barred owing to the dismissal of a previous action for partition, the learned Judge dismissed the plaintiff's case. The plaintiff appeals. The petition of appeal does not make anybody respondent to the appeal, although it names thirty-six defendants. It transpires that two of the persons named as defendants are dead, and after hunting throughout the record, it would seem that certain persons have been substituted as defendants in the place of the 14th defendant, and they have been added in the caption in the Court below as the 37th to 44th defendants. It would seem that the 34th to 36th defendants were added as the heirs of the deceased 25th defendant. The petition of appeal does not even mention the 37th to 44th defendants as defendants in the action. However, it appears that certain of the defendants accepted security for costs on the appeal, so they appear to have accepted the position that they were respondents to this appeal, and all the defendants were served with notice of appeal. There is only one appeal from the decree, and that is the appeal by the plaintiff. At the hearing of the appeal an appearance has been entered for the 26th defendant only. In holding that the decree in the previous action No. 9,972 was *res judicata*, the learned Judge relied upon the case of *Perera v. Fernando*.[1] That case is not on all fours with the present one, because there the previous action was one for a declaration of title and not for partition. Two cases have been cited on appeal (*Fernando v. Menikrala* [2] and *Sanchi Appu v. Jeeris Appu* [3]). In the first of these cases it was held that the dismissal of an action for the partition of a land on the ground that the plaintiff had failed to prove that he had a share cannot be pleaded as *res judicata* in a subsequent action brought by the plaintiff for a declaration of title to that share, because in the partition action he had to prove an absolutely good title against all the world, and in the other action he had to prove only a better title than the defendants.

[1] *(1914) 17 N. L. R. 300.*

[2] *(1902) 5 N. L. R. 369.*

[3] *(1920) 22 N. L. R. 176.*

In the second of these cases it was held that the dismissal of a plaintiff's action for partition on the ground that he had neither paper title nor title by prescription was no bar to the subsequent action for declaration of title between the same parties. These cases are to an extent more to the point, inasmuch as in both of them the previous action was one for partition, but in both those cases the subsequent action was an action for declaration of title. We have before us now two partition actions to consider. I have a considerable difficulty in bringing a partition action, by itself, within the provisions of section 207 of the Civil Procedure Code, which deals with *res judicata*. The explanation to that section says that on the passing of a final decree in an action in which relief of any kind is claimed, the cause of action for which the action was brought is *res judicata*. " Cause of action " is defined in section 5 as the wrong for the prevention or redress to which an action may be brought. 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. We have not been supplied with a copy of the previous action, but the learned Judge examined the record, and he tells us that the previous action was dismissed owing to non-prosecution. Non-prosecution by itself does not justify the dismissal of an action, but, however, apparently no appeal was taken in the matter, so that the decree dismissing the previous action stands. We are told, however, by Mr. Samarawickreme, who has a certified copy of the proceedings in the previous action, that the action was dismissed before the day for trial had been fixed, and even before some of the defendants in the action had been served with notice of the action. In the circumstances, it would seem that no contest arose in the previous action upon any dispute between the parties to which the explanation in section 207 can apply. In these circumstances, I would follow the decisions in *Fernando v. Menikrala* (*supra*) and *Sanchi Appu v. Jeeris Appu* (*supra*), and hold that the previous action is not *res judicata*. It is difficult, however, to be sure that in this action any issue of estoppel by *res judicata* was properly raised. Issues appear to have been framed on two contests which arose, and then a remark

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appears to have been made to the Court that the previous action was *res judicata*, a suggestion which appears to have been repudiated by the other side. Then, without any issue or any evidence with regard to the previous action, the Judge proceeded to decide the question by looking at the record in the old case. Moreover, there is nothing before us to show that the 26th defendant, who first mentioned the question of *res judicata* in his answer, was a party to the previous action. The only fragment of the previous action filed in the case is P 6, and that does not show the intervention of the 26th defendant, and does not show that he was duly added as a party to the previous action on his intervention. Another point may be considered in reviewing the question as to whether the previous action is *res judicata*. If one regards a partition action as an action founded on some cause, even if it be not such a cause as falls 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.

So it is possible to regard the present action as founded upon some cause which was not the cause upon which the previous partition action was founded. In other words, it is a fresh inconvenience and a new cause of action. The present action, however, is such that whatever the decision on the question of *res judicata* may be, some intervention by this Court is necessary in the interests of all parties to the action, because, on the contest raised and decided in the present action, the claims of all the defendants have been decided, and they have not appealed, so that there is an outstanding share with regard to which the plaintiff is in possession and to which none of the defendants could have any claim. I would accordingly set aside the decree subject to the remark which I will presently make, and direct a partition to be entered in terms of the learned Judge's findings as to the shares of the parties. In view of the smallness of some of the shares allotted by the learned Judge, it may be that a partition will be impracticable and that an order for sale should be made. If the learned Judge finds that to be so, he may make an order for sale.

The costs of the action will be *pro ratâ*. I will make no order for the costs on appeal. The plaintiff has taken no great care in formulating his appeal and in following the prescribed procedure, and the defendant appears to have been responsible for raising the suggestion that the case could be decided upon the principles of *res judicata*.

SCHNEIDER J.—I agree.

Set aside.