1936 *Present :* **Koch J. and Soertsz A.J.**

SILVA *v.* SILVA.

102—D. C. Galle, 33,586.

***Partition action—Case struck off the roll for failure of plaintiff to deposit survey fees—Subsequent action for partition of same land—More regularly constituted—Amended plaint filed in earlier action—Discretion of Court as to which action should proceed—Registration of* lis pendens.**

On November 7, 1934, an action was instituted for the partition of a land, the plaintiff disclosing title only to a share of the land.

The case was later struck off the roll for failure of the plaintiff to deposit the survey fees. On December 17, 1934, another action was instituted for partition of the same land, which was more regularly constituted.

Thereafter on April 10, 1935, the plaintiff in the earlier action filed an amended plaint, whereupon the plaintiff in the later case moved that he be not permitted to take any further steps in his action.

***Held*, that the Court had a discretion as to which action should be allowed to proceed and that the discretion should be exercised in favour of the more deserving party.**

APPEAL from an order of the District Judge of Galle.

N. E. Weerasooria (with him *T. S. Fernando*), for seventy-fourth defendant, appellant.

A. L. Jayasuriya (with him *E. B. Wickramanayake*), for plaintiffs, respondents.

Cur. adv. vult.

January 27, 1936. KOCH J.—

The question to be decided on this appeal is which of the two partition actions, Nos. 33,586 or 33,719, should take precedence of the other.

The earlier action is No. 33,586 and was instituted on November 7, 1934. The plaintiff, one Hettitantri Arnolis Silva, sought in this action to partition a land Addarawatta which he described as being 1 acre in extent. The plaint which he tendered to Court is of an extraordinary nature. He named thirteen persons as defendants and set out a title whereunder he and the defendants were alleged to be co-owners of a 1/12th only of the land sought to be partitioned. Even in this respect he is not correct, as the various shares allotted to him and the defendants, when added together, do not amount to a twelfth. He alleges that the remaining soil shares were being possessed by other defendants. There are no other defendants, so that he must be taken to mean that the remaining 11/12ths belong to other persons not parties to the action.

He next avers that common possession of the land is inconvenient and impracticable, and prays for a partition of the entire land. How this can be done without the remaining co-owners being party-defendants, I fail to see.

His plaint clearly transgresses the requirements of section 2 of the Partition Ordinance, No. 10 of 1863, and should have been rejected.

The plaint however was accepted—I say wrongly so—and an order immediately made that the plaintiff should deposit survey fees amounting to a sum of Rs. 40 on or before November 28. This, I understand, is the practice of the Galle Court. At any rate, the plaintiff understood it as such, for in paragraph 14 of his plaint he says that " the improvements on the land will be pointed out to the surveyor at the preliminary survey ".

The direction was not complied with and the District Judge made order " struck off ". This order was entered on November 28. The District Judge from whose judgment this appeal is taken has admitted that he finds difficulty in construing what exactly the words " struck off " mean. I share that difficulty, but it is necessary that some meaning be given to the words.

When a case is on the trial roll and an order " struck off " is made, the effect is to take the case off the trial roll and reinstate it on the summons roll. But when a case is on the summons roll and an order " struck off " is entered, one cannot be blamed for concluding that the intention was to take the case off the roll of pending cases. I do not decide the point as it is unnecessary for me to go to that length, but in my opinion the order made was adverse to the plaintiff and had to be vacated before he could proceed any further. This was not done, and matters remained as they

were till December 17, 1934, when one Ginige Arnolis instituted another partition action in respect of the land Addarawatta giving the extent as 2 roods.

All the alleged co-owners were made parties to this action but on February 15, 1935, an amended plaint was filed by this plaintiff into which a number of additional defendants were introduced as co-owners presumably as the devolution of title was not quite correct. To judge from the journal entries, it would appear that a real attempt to effect service on defendants amounting in number to 116 was made and several had already been served before April 10, 1935, when the plaintiff in action No. 33,586 introduced a co-plaintiff and filed an amended plaint to which he made 144 defendants parties. In this plaint the extent of the land is given as 2 roods. The plaintiff in the later case was made the seventy-fourth defendant in this amended plaint.

The journal entries in the earlier case showed that between the date of the order "struck off" entered on November 28, 1934, and April 8, 1935, not one single move was made by the plaintiffs in this case, and to all intents and purposes the plaintiff appeared to have abandoned his action.

This being so, the plaintiffs in the later case moved on that day in the earlier case that no further steps should be permitted to the plaintiff in the earlier case in view of the various steps that had been taken by the plaintiffs in the later case to prosecute their action. This motion naturally involved the question on the present appeal and, argument having been heard, the learned District Judge delivered his judgment on June 10, 1935, holding that the earlier case should be given preference and decided first. I am not at all sure that the learned District Judge is right.

The point is by no means novel, for in *34 D. C. (Inty.) Galle, 21,987—S. C. M. 19/3/25,* and in *D. C. Galle, 31,067—S. C. M. 5/6/33,* the later cases were allowed to proceed. I have called for these cases and found that Ennis J. in D. C. Galle, 21,987, was of the opinion that the plaintiff was dilatory and that his action was not properly constituted. The identical remarks apply to the plaintiffs in the case before us. In D. C. Galle, 31,067, the appeal was dismissed without argument, but it is interesting to note that the learned District Judge has set out that the plaintiff failed to deposit the fees for the preliminary survey and the case was in consequence "struck off" as in this case. He also makes a point that the plaintiff failed to proceed just as in this case.

The latter of these cases was decided after the Registration of Documents Ordinance, No. 23 of 1927, was enacted, but the learned District Judge in the case before us seems to think that the effect of the registration of the *lis pendens* as provided for in the Ordinance escaped the attention of the Court. Very presumably no reference was made in the judgment to the registration of the *lis pendens* in a partition action because in the opinion of the Judge that factor in an application of this nature played no prominent part. The reason why the learned District Judge in the case before us gave much point to this incident is because the *lis pendens* in the earlier case was registered on the day the plaint was filed. It also transpires that the *lis pendens* in the later case was

registered on January 10, 1935. It must however be noted that the registration of the *lis pendens* in the earlier case was not notified to Court till April 10, 1935, on which day the plaintiff in the earlier case tendered his amended plaint.

In *Wickremaratne v. Jayewickreme*[1], the District Judge had held in favour of one of the actions proceeding on the ground that the *lis pendens* in that action was duly registered whereas the *lis pendens* in the other was not. Akbar J. discovered that the *lis pendens* in the action to which preference was given was not duly registered, and was at pains to point this out. It followed that such steps as were taken in both actions were valueless in view of the provisions of section 12 (1) of the Ordinance No. 23 of 1927. In consequence there were no merits to be considered in either case and as the steps shown in the journal entries of both cases were irregular, he ordered a dismissal of both actions. It was not intended to make the due registration of the *lis pendens* the deciding factor in an application of this nature, though the circumstances could properly be taken into consideration in weighing the merits of the two cases. Section 11 (7) of Ordinance No. 23 of 1927 has a limited application and must be read in conjunction with section 12 (4).

I am of opinion that in these circumstances we have a discretion and that that discretion should be exercised in favour of the more deserving party. There is nothing in the respondent's institution and conduct of his case to merit any consideration. He has rushed into Court without proper inquiry and defaulted in obeying the order of the Court and has thereby led the present appellant to incur expenditure over a survey, &c. I hold that preference should be given to the latter action.

The order of the District Judge is set aside and the appeal allowed with costs in both Courts.

SOERTSZ A.J.—I agree.

Appeal allowed.