1915.

Present: Wood Renton C.J. and Pereira and Ennis JJ.

BABIYALE *v.* NANDO *et al*

44—D. C. Negombo, 6,309.

Alienation pending partition—Ordinance No. 10 of 1868, s. 17—Plaint in partition suit—Should it be registered?—Priority of registered subsequent deed.

The first defendant instituted in 1897 a partition action for the land in dispute. A preliminary decree for partition was entered, but no further steps were taken in that action, and no order of abatement was made. The plaintiff purchased on January 4, 1914, an undivided one-eighth share of the land from the heirs of one Samuel. None of the plaintiff's predecessors in title were parties to the partition action.

Held, (1) that plaintiff's deed was void under section 17 of the Partition Ordinance; (2) that the plaintiff's deed did not become valid by registration by virtue of priority under section 17 of the Land Registration Ordinance, No. 14 of 1891, owing to the order of Court allowing the plaint in the previous partition suit not having been registered.

THE facts are set out as follows in the judgment of the District Judge:—

Plaintiff claims two-sixteenths of the land sought to be partitioned. There was an old partition case in 1898, No. 2,056, which advanced as far as the interlocutory decree. This two-sixteenths was mortgaged by Samuel to Andrisa, second defendant in that case, and Andrisa gave evidence to that effect (P 1), but by an error decree was entered giving Andrisa the share as if it were his own. Plaintiff has purchased from the heirs of Samuel. The defendant's counsel contends that as no final decree has been entered, the case 2,056 is still pending. This view, I think, is untenable. . . . . In this case, too, the parties, although they neglected to bring the case to a conclusion, have acted as though the decree had been final, the objectors themselves having purchased shares of other co-owners. Further, sufficient time has elapsed for a change in the mode of possession to have taken place, and for such possession to have acquired the force of prescriptive possession.

Again, parties who delay to carry a partition case beyond the interlocutory decree often believe. . . . . . . that they got their shares they claimed, and go on possessing in this assumption until they find out this error in the decree, and move for amendment. In this case, as the parties did not discover the error, they may have continued to act as though title still vested in Samuel. It is for the Court, then, to find out what has been the mode of possession since this decree, and whether Andrisa, in fact, acted on it as if the share were his. But, as Mr. de Kretser pointed out, it would have been simpler and safer for plaintiff before purchase to have moved his vendee to have procured a final

decree in No. 2,056. In that case his position would have been stronger, and the question would have arisen whether Andrisa could, on the strength of an interlocutory decree, have maintained a claim to this share. For it is doubtful whether an erroneous interlocutory decree can give a party title to a share which he did not claim.

E. W. Jayewardene (with him *L. H. de Alwis*), for the third, fifth, and sixth defendants, appellants.—Plaintiff's purchase was void, as the sale took place pending the partition action. [Ennis J.—Considering the length of time that has elapsed after the interlocutory order in the partition case, can an order of abatement be presumed?] We cannot presume that an order of abatement was made in the case. See *Hukm Chand on Res Judicata 707, 4 A. C. R. 8, 4 McQueen 972.*

[Ennis J.—Has not a plaint to be registered to give effect to the doctrine of *lis pendens?*] It is so in England (see *18 Halsbury 221*). But here acceptance of a plaint is not a judgment or order which can be registered under our Registration Ordinance. Counsel cited Banerjee's *Registration of Documents in India 46, 9 All. 108.* Moreover, it was held in *Bernard v. Fernando*[1] that sections 16 and 17 of the Registration Ordinance do not apply to partition decrees, as they are not like other decrees, affecting land merely declaratory of the existing rights of the parties *inter se;* they create a new title in the parties, absolutely good against all other persons whomsoever.

Counsel also cited *Gous Mohomad v. Khan.*[2]

A. St. V. Jayewardene (with him *Mahadeva*), for the plaintiff, respondent.—As the plaint was not registered the conveyance was valid. [Pereira J.—The conveyance was void *ab initio.*] If the plaint was registered the partition action would have been properly constituted, and the conveyance would have been void in that event.

An alienation after the interlocutory order is not necessarily repugnant to section 17 of the Partition Ordinance. See *Perera v. Alvis,*[3] *Abdul Ally v. Kelaart,*[4] *Louis Appuhamy v. Punchi Baba.*[5]

The plea of *lis pendens* cannot be raised successfully unless the action was actively prosecuted. Here the parties abandoned the litigation.

The Supreme Court has the power to make the order of abatement *nunc pro tunc,* as justice would be done in the case in that event. Counsel cited *Luwaris v. Kirihamy,*[6] *Black on Judgments 126, Turner v. London and South-Western Railway Company.*[7]

E. W. Jayewardene, in reply. [Their Lordships desired to hear appellant why an order of abatement *nunc pro tunc* should not be made.]—That point is raised for the first time here. There is no

[1] *(1913) 16 N. L. R. 438.*
[2] *(1876) 23 Cal. 450.*
[3] *(1913) 17 N. L. R. 135, at page 138.*
[4] *1 Bal. 40.*
[5] *10 N. L. R. 196.*
[6] *3 Notes of Cases 38.*
[7] *17 L. R. Eq. 561, at page 569.*

issue on it? If an issue was framed the appellant would have put his reasons forward.

The powers of the Supreme Court are limited by the Courts Ordinance, and this Court has no inherent power to make an order of abatement now.

Cur. adv. vult.

July 8, 1915. ENNIS J.—

This was an action for partition. The plaintiff purchased on January 4, 1914, an undivided one-eighth share of the land from the heirs of one Kaluhennedige Don Samuel. It appears that the first defendant in 1897 instituted a partition action for the same land. A preliminary decree for partition was entered, but no further steps were taken in that action, and no order of abatement has been made. None of the plaintiff's predecessors in title were parties in that action. The defendants-appellants contend that the present action cannot be maintained.

Two points for consideration have been argued on the appeal. First, whether the plaintiff's deed is void under section 17 of the Partition Ordinance; and second, whether the deed should not be deemed valid by virtue of priority under section 17 of the Land Registration Ordinance, No. 14 of 1891, owing to the order of the Court allowing the plaint in the previous partition suit not having been registered.

Section 17 of the Partition Ordinance provides that it shall not be lawful for any owner to alienate his undivided share when proceedings for partition have been instituted, unless and until the Court shall, by its decree in the matter, have refused to grant the application. It is conceded that the term "owner" includes all owners, whether parties to the suit or not. But it is urged that the moment the Court had made a decree for partition it could not alter it, and thereafter the ordinary rule of *lis pendens* would apply, as the Court could not then make an order refusing the application. A decision of De Sampayo A.J., which was agreed in by Lascelles C.J., in *Luwaris v. Kirihamy,*[1] was cited in support of this argument. In my opinion that case is not on all fours with the present one. There the party on whose behalf the question was argued on appeal had not put forward the plea in the District Court, and was content to have her rights decided on their merits. Her substantial rights had not been prejudiced, and this was one of the grounds for dismissing the appeal. So long as an owner who is not a party can intervene in a partition suit at any time before the final decree is entered up, and it is conceded that he can, the District Court might find it necessary to so far modify its preliminary decree as to hold the intervenient alone entitled and refuse to grant the application. If, then, the Court can refuse to

[1] *3 Notes of Cases, 38.*

grant the application at any time before final decree, the terms of section 17 of the Ordinance prohibit any alienation till then, and declare any such alienation void. In the circumstances I do not see any room for the application of the rule of law that an action not actively and constantly prosecuted is no longer pending.

It was urged that the Court should make a *nunc pro tunc* order of abatement of the earlier action. In my opinion it would not be right to make such an order, even if it could be done, for the purpose of rendering valid an alienation of land which the Partition Ordinance declares void.

I at first thought there was some force in the contention, that if the order of the Court allowing a plaint in a partition action is an order affecting land within the meaning of section 16 of the Land Registration Ordinance, 1891, the prior registration of the document of later date would give it validity by priority, but have come to the conclusion that it could not affect the validity of the later document. If the document is void at the time of execution, its subsequent registration would not affect the quality of the document, and it is not necessary then to consider whether an order allowing a plaint in a partition suit to be filed is an order affecting land within the meaning of section 16 of the Registration Ordinance. I would allow the appeal, and refuse the plaintiff's application, without prejudice to any rights he or his predecessors in title may have.

WOOD RENTON C.J.—

I agree to the order proposed by my brother Ennis; and with the distinction drawn by him between the present case and *Luwaris v. Kirihamy*,[1] Mr. Justice Pereira was prepared to assent to the order which we are making, but he has unfortunately been prevented by illness from signing this judgment. It must, therefore, be regarded as a decision of a Bench of two Judges only.

Appeal allowed.

[1] 3 *Notes of Cases*, 88.