1954 *Present:* Gratiaen, J., and Gunasekara, J.

SOOTHIRATNAM (widow of V. Velupillai) *et al.*, Appellants, *and* ANNAMMA (widow of Amirthalingam), Respondent

S. C. 403—D. C. Jaffna, 4,900/L

Abatement of action—Actio roi vindicatio—*Transfer of subject-matter by plaintiff pending action—Effect of abatement order on separate action instituted by plaintiff's transferee—Civil Procedure Code, ss. 396 403, 404—Registration of Documents Ordinance, s. 11 (1) and (3).*

Section 403 of the Civil Procedure Code, which prohibits a fresh action being brought when an action has abated, directly affects only those persons who, while they are precluded from instituting separate proceedings on the same cause of action, nevertheless enjoy the alternative remedy of having the order of abatement vacated in order that the original action may be proceeded with.

A instituted against B an action for the recovery of certain property. The *lis pendens* was not registered. During the pendency of the action, A transferred the property in dispute to C. Subsequently A died, and, as his legal representatives took no steps to continue the proceedings, an order of abatement was made by Court under section 396 of the Civil Procedure Code. Before A's action had abated, C had instituted the present action in his own right to have the same defendant, B, ejected from the premises.

Held, that the provisions of section 403 of the Civil Procedure Code did not prevent the maintenance of the present action.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, for the plaintiffs appellants.

H. W. Tambiah, for the defendant respondent.

Cur. adv. vult.

January 21, 1954. GRATIAEN, J.—

On 23rd March 1946 the appellant obtained from Velupillai Vinasithamby for valuable consideration a notarial lease of the property in dispute for a period of ten years commencing on 1st April 1946. He was unable to obtain vacant possession of the leased premises, and on 8th October 1948 he filed this action alleging that the defendant was a trespasser on the premises, and prayed *inter alia* for a decree of ejectment against him. That such a remedy is *prima facie* available to a lessee of immovable property by virtue of the *pro tanto* alienation in his favour is not disputed.

The defendant denied that he was a trespasser, and claimed to be the owner of the property by virtue of a title superior to that of the appellant's lessor Vinasithamby. A number of issues were framed at the commencement of the trial, but, after some evidence had been led, certain additional issues were raised which, in the submission of the defendant's counsel, went to the root of the action. The learned Judge agreed to adjudicate upon these additional issues in the first instance, and after hearing argument upheld the defendant's plea that the appellant was precluded from maintaining the action by reason of certain admitted facts which I shall now proceed to examine.

It was established by the evidence that, before the execution of the lease in favour of the appellant, his lessor Vinasithamby had himself instituted a *rei vindicatio* action on 16th October 1944 against the defendant for the recovery of the property in dispute. Before the trial was concluded, however, Vinasithamby died, and, as his legal representatives took no steps thereafter to continue the proceedings, an order of abatement was duly made by the trial Judge on 15th October 1948 in terms of section 396 of the Civil Procedure Code. It will be observed that, before the date of this order, the appellant had already instituted the present action in his own right to have the defendant ejected from the premises. Nevertheless, the learned Judge upheld the plea that the subsequent order of abatement made in the action filed by Vinasithamby was binding on the appellant and had the effect of precluding him from pursuing his independent remedy against the defendant.

The consequences of a valid order of abatement under section 396 or under any other provision of Chapter 25 of the Civil Procedure Code are set out in section 403. It operates *in personam* so as to preclude a plaintiff (or his personal representative, as the case may be) from instituting separate proceedings upon the same cause of action ; and his only remedy is to apply to have the order of abatement in the original action vacated with the result that, unless this result is achieved, he cannot obtain a final adjudication of the merits of his claim against the opposite party. The principle involved is analogous to, but not the same as, that which applies in the doctrine of *res adjudicata*. Shortly stated, the latter rule prohibits the re-agitation by a party (or his privy) of issues which have already been finally and conclusively settled by a concluded judicial decision ; the former prevents a party whose failure to prosecute his remedy with due diligence has led to a discontinuance of the action from seeking relief on the same grounds in separate proceedings. On the other hand, section 403 has no direct application to a lessee under the plaintiff or to any other transferee of an interest pending the action. If the action has not abated, he may, if he thinks fit, apply to be added or substituted as a party under section 404 ; and if he does not take that precaution he runs the risk of being adversely affected by the ultimate decree passed in those proceedings by the operation of the doctrine of *lis pendens*. But section 404 does not apply to an action after it has abated and so long as it has thus ceased to be " pending " within the meaning of the section.

There can be no doubt that Vinasithamby's legal representatives would be precluded from instituting fresh proceedings against the defendant upon the earlier cause of action. But the question is whether the order of abatement is similarly binding upon the appellant whose right to eject the defendant admittedly depends upon the validity of the title of his lessor Vinasithamby.

Section 403 primarily affects only a plaintiff or his legal representatives. It is unnecessary to decide for the purposes of this appeal whether a person who, *after* the date of an order for abatement in an action relating to property, purchases or obtains an interest in that property from the plaintiff, would be prevented (as a privy) by some other principle of law

from re-agitating the same issues in separate legal proceedings instituted on his own behalf against the same defendant. We are here concerned with the position of a litigant whose alleged rights as lessee were obtained before the order of abatement had been entered against his lessor, and who had actually instituted legal proceedings for the enforcement of his independent remedy before the lessor's action had abated. In such a situation, the provisions of section 403 do not prevent the maintenance of the action which he had previously instituted in his own right. Section 403 directly affects only those persons who, while they are precluded from instituting separate proceedings on the same cause of action, nevertheless enjoy the alternative remedy of having the order of abatement vacated in order that the original action may be proceeded with.

As I have already pointed out, the effect of an order of abatement is not precisely the same as that involved in the doctrine of *res adjudicata*. But let us even assume that, instead of Vinasithamby's earlier action against the defendant having abated, it had actually proceeded to trial and finally terminated in a decree in favour of the defendant subsequent to the execution of the notarial lease in favour of the appellant. Even in that event, the final decree against Vinasithamby would not have been binding on the appellant unless the defendant relying on the decree in bar of the appellant's remedy had proved that *lis pendens* had been duly registered in the earlier action—*vide* sections 11 (1) and 11 (3) of the Registration of Documents Ordinance. In the present case, the defendant has not established due registration of the *lis* in which the order of abatement against the appellant's lessor was made after the date of the lease relied on by the appellant. For this reason, the preliminary issues of law raised by the defendant should have been answered against him even if the order of abatement could properly have been regarded as the equivalent of a final decree dismissing Vinasithamby's action.

I would set aside the judgment under appeal, and send the record back for a trial *de novo*. The appellant is entitled to his costs of appeal and to his costs in the abortive trial. I desire, in conclusion, to point out that the procedure adopted in the Court below was not in conformity with that prescribed by section 147 of the Code. In an appropriate case, a trial may at the outset be confined to the disposal of preliminary issues of law which are considered to go to the root of the litigation. But, after a trial has commenced for the determination of all the issues of fact and law which properly arise, it should not be interrupted at a later stage for the intermediate disposal of some only of the issues. Such a procedure is not warranted by the Code, and very often leads to unnecessary delay and expense to litigants. For instance, the consequence of the learned Judge's erroneous decision on some issues in an action instituted in October 1948 is that the entire proceedings must now commence afresh. If the learned Judge had insisted, as he should have done, on all the evidence being led at the earlier trial, the case might well have been finally disposed of at the hearing of the present appeal upon a consideration of his recorded findings on all the issues.

GUNASEKARA, J.—I agree.

Judgment set aside.