

1965 Present : Sirimane, J., and Manieavasagar, J.

L. DON SADIRIS, Appellant, and L. HEENHAMY
and others, Respondents

S. C. 150/64 (Inty.)-D. G. Tangalle, 838/P

Partition action-Lis pendens-Registration of it in the wrong folio-Resulting position-Partition Act (Cap. 60), ss. 6,13 (1), 23 (1), 48.

Where, in a partition action, a contesting defendant raises the point that the lis pendens has been registered in the wrong folio, the action should not be dismissed merely on that ground. When it is found in the course of a trial that the lis pendens has been incorrectly registered, the proper procedure is to take the case off the trial roll and offer the plaintiff an opportunity of correcting his mistake, and, thereafter, taking such steps as are necessary to bring the case to trial.

APPEAL from an order of the District Court, Tangalla.

D. R. P. Goonetilleke, with S. Gunasekera, for the plaintiff-appellant.

E. A. O. de, Silva, for the 8th, 9th, 11th, 12th and 13th defendants-respondents.

July 20, 1965. **SIRIMANE, J.-**

The plaintiff filed this action for the partition of the land called Punehi-wewawatta depicted in plan X. He claimed title on a deed of 1916 marked P3. There were several matters in dispute between the parties and at the commencement of the trial 13 points of contest were raised. In the course of the trial Counsel for some of the contesting defendants raised two further points, i.e., whether the lis pendens had been duly registered,

and, if not, whether the plaintiff could maintain this action. The learned District Judge held that the lis pendens was not duly registered and for this reason dismissed the plaintiff's action. The plaintiff has appealed.

Section 6 of the Partition Act (Chapter 69) requires a plaintiff to file with his plaint an application (in the form prescribed by the Registration of Documents Ordinance) for registration of the action as a lis pendens. Section 13, sub-section (1), of the Partition Act, provides that when the Court is satisfied that a partition action has been registered as a lis pendens under the Registration of Documents Ordinance, summons, etc., should be issued. In both these sections there is no reference to 'due registration'. In the case of partition actions filed under the old Ordinance No. 10 of 1863, Section 12, sub-section (1), of the Registration of Documents Ordinance, provided that summons should not be issued unless and until the action has been duly registered as a lis pendens.

In this case the Us has been registered as required by section 6.

A lis pendens is duly registered when it is registered in the folio (or a continuation of it) in which the oldest deed relating to the land is registered. This is usually referred to as the " correct folio " .

What would be the result if it is found during the course of a trial that the registration of the Us is not in the correct folio ? In practice there are several cases where the large majority of deeds are registered in a particular folio, but a very diligent search of the Land Registry may reveal that the oldest deed is registered in another folio. Should then the action be dismissed ? I think not. The purpose in registering a lis pendens is two-fold: firstly, that all parties who have registered documents may have notice of the action ; and, secondly, that intending purchasers of undivided shares may be made aware of the partition action that is pending. There is no provision in the Partition Act itself for the dismissal of an action merely on the ground that the lis pendens has not been registered in the correct folio. It may be noted here that even in a case where the lis pendens has been incorrectly registered in an action under the old Ordinance, it was decided in the case of *Seneviratne v. Kanakaratne*[1 (1937) 39 N. L. R. 272.] that there is no provision in the Registration of Documents Ordinance for dismissing an action on the ground that lis pendens has not been duly registered.

According to the provisions of section 48 of the Partition Act, the interlocutory decree and final decree would be final and conclusive and binding on the parties to the action, whether the Us is registered in the correct folio or not. But when a lis pendens is not correctly registered, the decree will not have this conclusive effect as against a person, who, not being a party to the action, claims rights in the land which are not directly or remotely derived from the decree. That is the only consequence of obtaining a decree where the lis pendens has been incorrectly registered.

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In my view, an action should not be dismissed merely because the lis pendens has been registered in the wrong folio. When it is found in the course of a trial that the Us has been incorrectly registered, the proper procedure is to take the case off the trial roll and offer the plaintiff an opportunity of correcting his mistake ; and after a declaration is filed by his Proctor under section 25 (1) of the Partition Act, and any new party which it may be necessary to add has been given notice, the Court will proceed on with the action. In the case of *Victor Perera v. Jinadasa*[1 (1962) 65 N. L. R, 451], relied upon by the defendants-respondents, the question we have to decide here did not arise, and the decision in that case has no application to the facts in the present case. It was conceded in the argument before us that the lis pendens in this case has been incorrectly registered. The order of the learned District Judge is set aside and the case is sent back to the District Court so that the plaintiff may be given an opportunity of registering his lis pendens in the correct folio, and, thereafter, taking such steps as are necessary to bring the case to trial. The plaintiff had not corrected his mistake even after the point was raised in the lower Court. The order for costs against him in the lower Court will stand, but he will be entitled to the costs of this appeal.

MANICAVASAGAR, J.-I agree.

Order set aside.

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