IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

2. Kudarallalage Seela Pemalatha,
3. Senadhi Pathirennehelage Upatissa,

   Both of
   Thelkumuduwala,
   Ampagala.
   2nd and 3rd Defendant-Appellants

CASE NO: CA/648/1999/F
DC AVISSAWELLA CASE NO: 18031/P

Vs.

1. Kudarallalage Jayawardena,
2. Liyana Arachchillage Hamy Nona,
3. Kudarallage Ranjith Dayananda,

   All of
   Thelkumuduwala,
   Ampagala.
   Plaintiff-Respondents

1. Ranawaka Arachchillage Podimenike,
   Thelkumuduwala,
   Ampagala.
   1st Defendant-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandaratne, P.C., with Anil Rajakaruna for the 2nd and 3rd Defendant-Appellants.
H. Withanachchi with Shantha Karunadhara for the Plaintiff-Respondents.

Decided on: 16.01.2019

Samayawardhena, J.

The three plaintiffs filed this action against the three defendants seeking to partition the land described in the schedule to the plaint between the 3rd plaintiff (subject to the life interest of the 1st and 2nd plaintiffs) and the 1st defendant in equal shares. The 2nd and 3rd defendants, according to the plaint, were made parties because they are in forcible occupation of the land without any soil rights. The 1st defendant did not contest the case of the plaintiff.

The only contesting defendants were the 2nd and 3rd defendants who are the wife and husband respectively. The 2nd defendant is not an alien. She is the daughter of the 1st and 2nd plaintiffs, and the sister of the 3rd plaintiff.

The 2nd and 3rd defendants took up two positions at the trial. One is, they have prescribed to the land—vide issue Nos. 9 and 10. The other is, the plaintiffs cannot maintain this action on *res judicata* in view of the decree entered in case No.17478—vide issue Nos. 11 and 12.

The learned District Judge held against the 2nd and 3rd defendants on both points and decided to partition the land as prayed for in the plaint.

It is against this Judgment the 2nd and 3rd defendants have preferred this appeal.

When this matter came up before me for argument on 26.07.2018, the learned President's Counsel for the 2nd and 3rd defendant-appellants informed Court that he confines his argument only to the question of *res judicata*.

The plaintiffs in the plaint did not mention a word about case No. 17478/L, which the 2nd and 3rd defendants disclosed in their statement of claim. However, the 1st plaintiff during the course of cross examination admitted the said case. The case record was marked as 2V1-2V5 through the 1st plaintiff without any objection.

According to 2V1-2V5, there cannot be any dispute that the said case was filed by the same three plaintiffs against the 2nd and 3rd defendants on the same basis seeking virtually the same reliefs. That is, the 3rd plaintiff is entitled to ½ share of the land subject to the life interest of the 1st and 2nd plaintiffs and the 2nd and 3rd defendants are in forceful occupation of the land. The reliefs sought were declaration of title, ejectment and damages. In other words, the difference between the two cases are that the earlier one was a declaration of title action and the present one is a partition action. However, the plaintiffs' action in the earlier case was dismissed with costs on 13.05.1985 due to want of appearance of the plaintiffs on the trial date in terms of section

87(1) of the Civil Procedure Code. Thereafter, the plaintiffs, in terms of section 87(3) of the Civil Procedure Code, have made an application to get that order vacated, but the Court has, by order dated 07.10.1985, refused that application. The plaintiffs have hurriedly filed this action 16 days after the said order—i.e. on 23.10.1985.

Section 87(2) of the Civil Procedure Code reads as follows:

> *Where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.*

It is in that context the 2nd and 3rd defendants have stated that the matter is *res judicata* between the plaintiffs and the 2nd and 3rd defendants.[1] This is in fact not *res judicata* in the true academic sense, but a positive bar for the institution of a fresh action on the same cause of action.

The learned counsel for the plaintiff-respondents in the written submissions has cited *Herath v. Attorney General*[2] to say that decree of dismissal under section 84 of the Civil Procedure Code on non-appearance of the plaintiff (which is similar to section 87 of the present Code) does not operate as *res judicata*. It is relevant to note that as the Civil Procedure Code stood at that time, there was no similar provision in the Civil Procedure Code as the present section 87(2), which was introduced by Act No. 20 of 1977.

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[1] Vide 2nd paragraph of page 5 of the impugned Judgment at page 100 of the Appeal Brief.

[2] (1958) 60 NLR 193 at 222

I could not find a decided case where the present issue has been directly dealt with, i.e., whether the dismissal of a declaration of title action on non-appearance of the plaintiff operates as a bar for the subsequent filing of a partition action.

However, I found a case—*De Silva v. Juwa*[3]—where it has been decided that:

> *The abatement of an action for declaration of title to land is a bar against the institution of an action for partition in respect of the land where the same question of title is involved.*

Insofar as the question of abatement is concerned, as the Civil Procedure Code stood at that time, there was (and still is) a similar provision as section 87(2) of the Civil Procedure Code. That is section 403, which reads as follows:

> *When an action abates or is dismissed under this Chapter, no fresh action shall be brought on the same cause of action.*

The learned District Judge has taken the view that the cause of action in the earlier declaration of title action and the present partition action is not the same. In this regard, in *De Silva v. Juwa (supra)* the Supreme Court at pages 166-167 stated as follows:

> *But is the action "brought on the same cause of action?" The cause of action in the earlier proceedings in case No.*

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[3] (1935) 37 NLR 165

2,680 was the denial by the defendant of the plaintiff's claim to be the owner of these premises, the question at issue then being whether the plaintiff or the defendant was the true owner of the entirety of this land. As a result of the respondent's intervention in this action, identically the same question arises for decision and the plaintiff when he instituted this action must have realized that unless he was completely successful in his subterfuge that was the question which would arise for determination immediately notice of the pendency of this proceeding reached the intervenient. Inasmuch as he is now a defendant that is the one question which arises for determination. It is quite true that in theory an action for partition is a proceeding between co-owners, the purpose of which is to resolve their respective interests in common into holdings in severalty. But in a large percentage, perhaps too large a percentage, of cases what the Court has to determine is the respective rights of parties who are frequently if not generally in conflict as to such rights. In such cases a proceeding instituted under the Partition Ordinance is in substance, and I think in fact, an action for a declaration of title. Though in form actions for partition they are often in reality actions for a declaration of title to land. In Ponamma v. Arumugam [8 NLR 223], the Privy Council held that a certain action for partition brought under the provisions of the Partition Ordinance though in form an action for partition was in reality an action for the recovery of the land and as such was obnoxious to the provisions of section 547 of the Civil Procedure Code which prevented such an action

> *being maintained until administration to the estate had been obtained.*

"*The cause of action upon which a partition action is based is inconvenience of common ownership.*"[4] However did the plaintiffs file the partition action to achieve that objective? In the facts and circumstances of this case, they did not. There was no dispute between the plaintiffs and the 1st defendant regarding ownership or possession of the land. When the plaintiffs conclusively failed to eject the 2nd and 3rd defendants by filing a declaration of title action, immediately after the final decision, they filed this partition action, to achieve the same objective and not to end co-ownership between the plaintiffs and the 1st defendant. This is nothing but abusing the provisions of the Partition Law to achieve the ulterior motive of the plaintiffs, which is the ejectment of the 2nd and 3rd defendants from the land.[5]

In my view, the learned District Judge was wrong when she answered issue Nos. 11 and 12 in the negative. The plaintiffs' action shall fail.

I set aside the Judgment of the District Court and allow the appeal of the 2nd and 3rd defendants with costs both here and the Court below.

Judge of the Court of Appeal

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[4] Abeysundera v. Babuna (1925) 26 NLR 459
[5] Vide Selenchi Appuhami v. Livinia (1905) 9 NLR 59