PEIRIS AND OTHERS
v.
CHANDRASENA AND OTHERS

COURT OF APPEAL.
YAPA, J.,
GUNAWARDANA, J.
C.A.L.A. NO. 59/88.
D.C. COLOMBO NO. 7086/P.
OCTOBER 22, 1997.
NOVEMBER 21, 1997.
DECEMBER 18, 1997.

Partition Law, No. 21 of 1977 – S. 481, s. 70 – Non-prosecution of action – Defendant's application to prosecute action after judgment – Is it possible? Actus curiae neminem gravabit.

District Court permitted the 4th defendant-respondent to prosecute the partition action, after judgment had been delivered, as the action has not been prosecuted with due diligence.

It was contended in appeal that –

(*a*) Action has not been proceeded with due diligence.

(*b*) Non-prosecution for a period of 10 years and 10 years' adverse possession gives a person prescriptive title.

(*c*) That the 4th defendant-respondent being destitute of rights in the soil is precluded from prosecuting a partition action, in the capacity of a plaintiff.

Held:

1. S. 70 states that no partition action shall abate by reason of non-prosecution, and it impcses a duty on the Court to 'compel the parties' to bring the action to an end – which duty the Court in this case has failed to fulfil. Where a delay in an action is the act or omission of the Court, no party shall suffer for it.

2. It is a rudiment of the law partaking of the character of a first principle that no party can lose rights by extinctive prescription nor acquire rights by acquisitive prescription after the date of the institution and during the currency or pendency of the action.

3. There is no legal impediment to the 4th defendant-respondent prosecuting the partition action in pursuance of s. 70 – any defendant in s. 70 means – any defendant irrespective of whether he has soil rights or not can prosecute the action thereunder.

Quaere :

"Whether any action can be dismissed for want of prosecution after judgment is entered (as it is in this case)."

LEAVE to appeal from the order of the District Court of Colombo.

Cases referred to:

1. *Senathi Raja v. Brito* – 4 CLR 149.
2. *Hammedo v. Lucihamy* – (1923) 2 TCLR 112.

E. D. Wickramanayake for defendant-appellant.

D. R. P. Gunatillaka with *S. A. D. Suraweera* for 4th defendant-respondent.

Cur. adv. vult.

October 4, 1999.

GUNAWARDANA, J.

This is an application for leave to appeal against an order dated 26. 5. 1988 made by the learned District Judge granting permission or leave, to the 4th defendant-respondent, under the proviso to section 70 of the Partition Act, to proceed with or prosecute the partition action No. P. 7086 filed in the District Court, be it noted, nearly five decades ago, ie on the 19th of January, 1954, to be exact.

To the application made by the 4th defendant-respondent – to the District Court, by way of motion dated 26. 5. 1986 that he be allowed

to prosecute the action 9A, 51A, 53, 54 and 55 defendants-appellants had objected. It is to be remembered that there are over 60 parties to this action who had, to say the least, must of necessity, be taken to have acquiesced in the application of the 4th defendant-respondent or consented thereto since they have not raised any objection or demur.

The three-fold argument, characterised as it is by a platitudinous aura, if not, inanity, put forward before us challenging the aforesaid order of the learned District Judge, is not all that clear but their sense, if at all, may be distilled or extracted in order, as follows: (*a*) that because the action has not been prosecuted with due diligence the parties should be penalized by the dismissal of the action, (*b*) that the Court ought to dismiss an action concerning immovable property, as a partition action is, more readily than it would, any other action, more so as ten years have elapsed and there was (to quote the very words in the written submissions of the learned counsel for the (9A, 51A, 53, 54 defendants-appellants) : "non-prosecution for a period of 10 years . . . and 10 years' adverse possession gives a person prescriptive title to property,". (*c*) that the 4th defendant-respondent, being destitute of rights in the soil, is precluded from prosecuting, a partition action, in the capacity of the plaintiff.

It is to be remarked that a feature common to all three arguments enunciated above is that the points embodied in them, if any, are put forward with something like diffidence and not lucidly stated and one gets the impression that the learned counsel is merely vaguely hinting at certain things without pointedly stating them, which of itself, perhaps, betrays a lack of confidence in the validity of the submissions on the part of their propounder as will be even more clearly seen later on.

To deal with the above points *a, b, c,* in order : even assuming, as argued by the learned counsel for the above-mentioned defendants-appellants, that is, that lack of diligence and application in prosecution of a case entails an order of dismissal, the policy of the law, particularly

in a partition action is more to grant relief against the inconvenience of common ownership by means of bringing the action to a termination, which, in fact, had been done in this case, just short of one step, ie of entering the final decree. The decision in this appeal hinges on one pivotal point which had escaped the notice of everybody: section 70 of the Partition Act, which holds, the solution to this problem reads thus: "no partition action shall abate by reason of non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the Court has endeavoured to compel parties to bring the action to a termination, the Court may dismiss the action: provided, however, that in a case where the plaintiff fails or neglects to prosecute a partition action, the Court may, by order permit any defendant to prosecute the action and may substitute him as a plaintiff for the purpose and may make such order as to costs as the Court may deem fit". It is to be observed that section 70 quoted above, states, on an emphatic note, that no partition action shall abate by reason of non-prosecution of the same and it imposes a duty on the Court to "compel the parties" to bring the action to an end which duty the Court in this case has signally failed to fulfil. It is to be noticed that the District Court had merely contented itself with noticing plaintiff, as per the order dated 29. 9. 1972 (as pointed out in the written submissions) but had made no endeavour to compel the parties to the action to prosecute the same. It is significant to note that the original plaintiff had died in the following year, i.e. 1973, as pointed out by the learned counsel for the 9A, 51A, 53 and 55 defendants-appellants himself, and no step had been taken for as long as 14 years since the issuing of the said notice on the plaintiff, till the 4th defendant-respondent on 26. 5. 1986, on his own initiative, moved that he be permitted to prosecute the action, which application of the 4th defendant-respondent was allowed after an inquiry held by the Court after notice to the parties of the application of the 4th defendant-respondent. What I am seeking to emphasize is this, that is, that the Court had not endeavoured to compel, be it noted, "the parties", not just one party, as it had done by merely noticing the plaintiff, as stated above, if, in fact, perfunctorily issuing such a notice on the plaintiff can be described or recognised as an endeavour to "compel" at least

the plaintiff to prosecute the action. It would have been far more efficacious had the Court issued notice on all the parties without exception, on each single one of them, as was its clear duty to have done, "compelling" them to take the necessary steps in the action, on the very day that notice was ordered on the plaintiff, or at least some time later, when nothing had taken place or happened in response to the notice on the plaintiff. One must not forget the fact, as the Court had (forgotten) that section 70 makes it imperative or mandatory, before the action is dismissed, that (to quote the very words of the section): the "Court had endeavoured to compel the parties to bring the action to a termination". One could say without fear of contradiction that there would have been, at least, some, amongst the 60 odd parties, who would have been willing to go on with the case had they been "compelled" more so as there was, in fact, very little left to be done, as the interlocutory decree itself had been entered on 12. 4. 1965, ie nearly seven years prior to the date that the plaintiff had been noticed to follow up. Even after the lapse of nearly 14 years, after the notice was served on the plaintiff to which there had been no response, the Court had been content to let the case idle till the 4th defendant-respondent made the application, on his own, that he be permitted to continue the action. Thus, it will be seen that if the action had stagnated, without being prosecuted, the District Court had only to thank itself for that and I cannot bring myself to believe that parties should be penalized or inconvenienced by making an order of dismissal. I think it is superlatively right to say that the Latin Maxim: *Actus curiae neminem gravabit* – should come to the rescue of this case, rather of the parties, which maxim means that an act of the Court shall prejudice no man. Where a delay in an action is the act or the omission of the Court, no party shall suffer for it. Inconvenienced, for sure, they (the co-owners) would be if another action were to be filed afresh by a co-owner as suggested by the learned counsel for the 9A, 51A, 53, 54 and 55 defendants-appellants, for they would have to begin from the very beginning and make a repetitive effort. The argument of the learned counsel, for the aforesaid defendants-appellants, however well-intentioned, or rather assuming that it is so, is a classic example of the remedy being worse

than the disease and is somewhat reminiscent of the solution of that legendary wiseacre who in order to extricate the head of a goat who had put its head into a pot, first, severed the head and then smashed the pot to retrieve the head. One need not in this context elaborate on the frustrations which the long-winded litigation had caused to the litigants, ie the parties to this case, and such a course of action as that suggested by the learned counsel for the 9A, 51A, 53, 54, 55 DEFENDANTS-APPELLANTS, THAT IS, TO DISMISS THIS ACTION AT THIS STAGE, COULD BE UPHELD OR PURSUED ONLY BY SOMEONE WHO NOT ONLY LACKS DEVOTION TO HUMAN INTERESTS BUT ALSO THE COMMON SENSE TO FIND RATIONAL WAYS OR SOLVING HUMAN PROBLEMS IN A HUMANE WAY. To dismiss, even if it were legally possible to do so, an action which had reached the stage at which even interlocutory decree had been entered, be it noted, after the effluxion of nearly 50 years, would necessarily involve, much waste of effort, time and money, and a Court cannot be impervious to the consequences of making an order of dismissal which would be so destructive in its consequences, in the circumstances of this case. To dismiss this action at this stage is a decision or proceeding from which the mind or better judgment of any sensible man would have recoiled – let alone that of a Judge. To say, that this action had cost the parties an infinite deal of trouble – not to mention the "contributions" that would have been regularly levied on them – is to state the obvious. As explained above, as well, to "compel the parties" to bring the action to a termination by prosecuting it, is to compel each single one of them. Thus, the view upon which this order of mine is based has the virute of not only according with common sense but also the added one (virtue) of promoting the well-known policy of the law in two directions: (*a*) that of bringing to an end the inconvenience of common possession; (*b*) of avoiding and restraining repetitive litigation, that being the principle upon which the concept of *res judicata* is based –the sum and substance of the whole rule being, that a matter once judicially decided is finally decided. This point will be considered in relation to the question whether a partition action or for that matter any action, can be dismissed in law, after judgment – for it will be recalled that the relief sought by the 9A,

51A, 53, 54, and 55 defendants-appellants in this appeal, is the dismissal of this partition action on the basis that no diligence had been displayed in the prosecution of the same. As pointed out above, an endeavor on the part of the Court to "compel" all the parties to the action to bring the action to a termination is a necessary pre-requisite, a condition precedent, to the making of an order of dismissal in a partition action. And, as such an endeavor could not be said to have been made by the District Court in this action – making an order of dismissal as invited to do by the learned counsel for the 9A, 51A, 53, 54, and 55 defendants-appellants was wholly out of the question, although this simple yet all-important aspect of the matter was altogether glossed over at the argument before us.

To consider the 2nd point designated (*b*) above, it was insinuated, more than argued, by the learned counsel for the aforesaid defendants-appellants that the Court ought to make an order of dismissal since more than ten years have gone by since the institution of the partition action. To quote the relevant excerpt, verbatim, from the written submissions: "It is submitted that any non-prosecution – should be examined carefully. The question may be asked why ten years? The answer, respectfully submitted is that period of ten years has significance in many legal spheres. For instance, 10 years' adverse possession gives a person prescriptive title to immovable property. There, the period of ten years has a positive aspect resulting in acquisition of prescriptive title". (The above is an excerpt from the written submissions of the learned counsel for the 9A, 51A, 53, 54 and 55 defendants-appellants). The learned counsel had utterly neglected the realities, if not anything else, in making the above submissions. If partition cases have to be abated or dismissed for no better reason than that they are 10 years old – only an infinitesimal fraction of the partition cases currently pending in the Courts would be left over or spared. As I said before, it was not a firm argument but couched in the form of a tentative hint and that point was made not with the least expectation of acceptance or belief that it was a sound one. Although the learned counsel for the defendants-appellants had not said so directly what he was vaguely seeking to say was that some

parties would have acquired prescriptive rights owing to the inordinate delay in the prosecution of the partition case. But, the learned counsel for the 9A, 51A, 53, 54, and 55 defendants-appellants had not chosen to say that his clients had acquired any prescriptive rights; nor had he specifically mentioned that any other party or parties had. Self-interest must not cloud one's vision nor make one forget the law. It is a rudiment of the law, partaking of the character of a first principle, that no party can lose rights by extinctive prescription nor acquire rights by acquisitive prescription after the date of the institution and during the currency or pendency of an action. But, if one were to apportion the degree of culpability for the delay in the prosecution of this action, it is the 9A, 51A, 53, 54 and 55 defendants-appellants – an excerpt from the submissions of whose learned counsel is reproduced above – who should be blamed most, for by preferring this frivolous appeal they had delayed this case for as long as eleven years.

This appeal had caused this case to vegetate, uneventfully and monotonously in the Court of Appeal itself for as long as eleven years where there is a surfeit of venerable partition cases, venerable on account of age, and deserving to be museum pieces. Just as much as no one can do anything about the weather but talk about, it looks as if no one can do anything much about the law's delays either, particulary on the civil side.

One matter needs to be clarified, for the sake of completeness, in regard to the question of prescription that appears to have been raised half-heartedly, so to speak, by the learned counsel for the 9A, 51, 53, 54 and 55 defendants-appellants, ie that although, as pointed out above, the institution of a partition action would interrupt prescription, yet in the case of intervenients, prescription runs up to the joinder or addition of the intervenient as a party to the action as was held in *Senathi Raja v. Brito*[1] and *Hammedo v. Lucihamy*[2]. Thus, when a plaintiff brings an action and a third party, on his own, subsequently intervenes, the plaintiff can add the period between the institution of the action and the filing of the petition of intervention in calculating the ten years required by Prescription Ordinance and the intervenient

can similarly add the same period to establish his title. In other words, although the institution of the partition action arrests the running of prescription, yet an action cannot be said to be brought against an intervenient until he is actually added as a party and included in the action.

It may be remarked that there is a pronounced inconsistency in the submissions made by the learned counsel for the 9A, 51A, 53, 54, and 55 defendants-appellants, for the learned counsel whilst inviting the Court to consider the question of prescriptive rights (of which parties, he had ommited to say) had in the same breath (at paras 4 and 5 of his written submissions) invited the Court to dismiss this action as such dismissal would not cause much of a problem or prejudice to the parties since, to quote the very words of the submissions: ". . . if an action is dismissed for want of due diligence by the parties . . . a fresh action may be instituted, but, that action will be on the basis of a final and conclusive determination by the Court of the rights of the parties". The learned counsel for the aforesaid defendants-appellants had at para 4 (2) pointed out paradoxically enough that, to quote,: ". . . the dismissal of a partition action under section 70 shall not affect the final and conclusive effect given by section 48 to the interlocutory decree entered in such action". The learned counsel is mainfestly relying on the final and conclusive nature of the interlocutory decree that is already entered in this case, to persuade the Court to dismiss this action as the "sacrosanct" nature of the said interlocutory decree will, if a fresh action were to be filed, facilitate and make things easier and less difficult for the parties in the fresh action to prove their title. It is true that in terms of section 48 (1) of the Partition Act, the interlocutory decree and the final decree entered in a partition case shall subject to the decision of any appeal . . . be good and sufficient evidence of the title of any person as to any right or share interest awarded therein and be final and conclusive for all purposes against all persons whomsoever . . ." But, if this action is dismissed, as argued or suggested by the learned counsel for the said defendants-appellants – the interlocutory decree too will disappear and be swept away and even if the parties are

fool-hardy enough to file a fresh action, they will have no interlocutory decree to reply on, but only a memory of it. Implicit in the learned counsel's argument is a suggestion that this action can be dismissed whilst retaining the interlocutory decree. One cannot even dream of such a situation. Although I always credit the counsel with a knowledge of the law and common sense, perhaps, from force of habit, it is a pity that the counsel do not seem to reciprocate, for none with even a spark of common sense would be taken or impressed by such submissions as had been made in this matter, for they are not graced by the smallest approach to that virtue (of common sense). I suppose, the learned counsel did not intend that his submissions should be taken at his word, so to say. THE ARGUMENTS TO BE CONVINCING, LIKE MERRIMENT, SHOULD COME FROM THE HEART, IF NOT THE HEAD, AND NOT FROM THE LIPS. If I dismiss this case, as prayed for by the learned counsel for the 9A, 51A, 53, 54 and 55 defendants-appellants, as it is open to the parties to file a fresh partition action relying on the interlocutory decree in this case, as argued by the learned counsel for the aforesaid defendants-appellants, even assuming that argument is a sound one, I cannot bring myself to believe that I am acting in the way that a good Judge would have acted in this situation – for it is the duty of a good Judge to prevent litigation, that suit, may not grow out of suit as it concerns the welfare of a state that an end be put to litigation.

Lastly, the learned counsel for the aforesaid defendant-appellants had contended that the 4th defendant-respondent who had been granted leave to prosecute the action is not entitled in law to do so as he (the 4th defendant-appellant) has no soil rights in the corpus.

I am afraid that argument has no factual basis as betrayed by the written submissions filed by the learned counsel himself for the 9A, 51A, 53, 54 and 55 defendants-appellants. (The fact that neither the judgment nor the interlocutory decree entered by the District Court was made available to us for examination by either party calls for remark. Under normal circumstances, one would have expected the learned counsel for the substituted plaintiff-appellant to produce or

tender the interlocutory decree or the judgment in proof of the fact that the 4th defendant-appellant had been allotted soil shares; perhaps, he, ie the learned counsel for the substituted plaintiff/4th defendant-respondent – would have thought that plain truths need not be proved). To quote from paragraph 12 of the said written submissions: "In terms of the amended interlocutory decree, what was given to the 4th defendant-respondent is as follows: "It is further ordered and decreed that the interests of the 4th defendant be given out of lot E so as to include the House No. 13, well No. 14 and the plantations as far as possible". To say that the 4th defendant-respondent had not been given soil rights is a misleading statement if, in fact, that was what the learned counsel for the 9A, 51A, 53, 54, and 55 defendants-appellants meant to say. None can fail to see that his submissions are mealy-mouthed – making his position indeterminate and so left doubtful, thereby making it somewhat difficult for the Court to deal with the same. What the excerpt from the interlocutory decree, culled from the written submissions of the defendants-appellants and reproduced above, means is this: that the 4th defendant-respondent should be given his "interests" out of lot E so as to include, as far as practicable, his improvements. The term "interests" in the context cannot be taken to mean anything else than soil interests, for after all, what other interests can be given out of lot E to include the improvements of the 4th defendant-respondent, as stated in the interlocutory decree, than soil interests or rights. The written submissions had been made rather gingerly so as to avoid committing oneself for the learned counsel had not explicitly stated in the written submissions, that the 4th defendant-respondent had not been given soil rights in the interlocutory decree, although he said so, most emphatically, in his oral submissions.

The point, that the 4th defendant-respondent was not entitled in law to prosecute the action inasmuch as he was not given soil rights by the interlocutory had been virtually overlooked by the learned counsel who appeared for him (4th defendant-respondent) and had not been dealt with in the counter submissions. Even assuming for the sake of argument, that the 4th defendant-respondent was not

entitled to soil rights yet, there is no legal impediment to his, ie the 4th defendant-respondent prosecuting the partition action in pursuance of section 70 of the Partition Law – the relevant excerpt of which is as follows: "Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action, the Court may by order, permit any defendant to prosecute the action and may substitute him as a plaintiff for that purpose . . .".

It is clear that the expression, "any defendant" in the above section 70 means just what it says, ie any defendant irrespective of whether he has soil rights or not can prosecute the action thereunder. The word "any" that occurs in section 70 of the Partition Act, is a term of wide generality and admits of no limitation or qualification. To illustrate the meaning of "any" the Oxford Dictionary has used the expression "any fool", perhaps, somewhat prophetically, which would mean each and every one of them. The word "any" as explained in Blacks Law Dictionary (5th edition) is often synonymous with "every" or "all" – so that the phrase "any defendant" that is employed in section 70 of the Partition Act is, so to say, a "catch-all" phrase, meaning all the defendants in the partition case. So that section 70 permits each single defendant, without exception or distinction, to step into the shoes of the plaintiff, in case the plaintiff omits to do in the action that which he ought to do or fails to prosecute the same with diligence. Suppose, the plaintiff fails to prosecute the action at a stage before the judgment or the interlocutory decree is entered, at which stage the Court not having investigated title does not know who would get interests in the soil after the investigation of title at the trial of the action. How is the Court to determine whether a contesting defendant, in particular, is entitled to soil shares, ie a defendant whose rights are not shown in the plaint for that can be ascertained after soil rights are determined after the trial. How is the Court to determine whether even the plaintiff or any other defendant to whom rights in the soil had been given in the plaint will, in fact, eventually get those rights, for a contesting defendant or defendant may set up and prove a devolution of title according to which the co-owners as shown in the plaint will not derive any soil rights whatsoever. EVEN THE PLAIN-

TIFF, IN A PARTITION CASE WHO INSTITUTES THE ACTION, IN ORDER TO BE ENTITLED OR ABLE TO PROSECUTE THE ACTION, NEED NOT STATISFY THE COURT THAT HE IS THE OWNER OF SOIL RIGHTS FOR THAT IS A QUESTION THAT HAS TO BE ADJUDICATED UPON AT THE TRIAL OR MORE PRECISELY AFTER ITS CONCLUSION.

The submission, that only a defendant with soil rights in an action can be substituted as the plaintiff in order to prosecute the same where the plaintiff has failed to do so with reasonable diligence, when carried to its logical conclusion would, at least, mean that no party can be substituted, before the stage of judgment or the interlocutory decree, whose rights are subject to controversy at the trial for one never knows whether that party, ie one whose rights are contested will eventually get or has rights in the corpus till the judgment is delivered.

Lastly, it is what one may call a moot point, in that it is not yet settled by judicial decision, as to whether any action can be dismissed for want of prosecution after judgment is entered, as it is in this case, and this case is one of first impression since it involves a question never before determined. In this case the final judgment had been delivered (as opposed to the final decree), ie one which finally disposes of the rights of the parties upon the issues or controversies arising on the pleadings. It is a final judgment, on the basis of which the interlocutory decree too had been entered ordering the partitioning of the land. The judgment, and the interlocutory decree based thereon represent such a conclusive determination of the rights of the parties in the corpus that nothing further remains to be done to fix or settle the rights of the parties and nothing is, in fact, left to be done by way of a step in the entire action, except to partition the land. In any other action, the judgment and decree or the judgment itself, terminates the action in Court and nothing is left to be done except to carry out and execute the judgment. Strictly speaking, it is I think, somewhat inappropriate to speak of non-prosecution of an action in which judgment has been entered, as it is in this case, which judgment represents or embodies a final decision or adjudication on the merits

subject, of course, to the decision of an Appellate Court, in case the said judgment is appealed against. A partition or any other action cannot be dismissed after judgment, amongst other reasons, because if that were permissible, that is, if an action could be dismissed after judgment, that would take away or detract from the effect of the rule that a final judgment rendered by a Court of competent jurisdiction is conclusive as to the rights of parties and constitutes an absolute bar to a subsequent action involving the same claim or cause of action, upon which the principle of *res judicata* is based – the sum and substance of the whole rule being that a matter once judicially decided is finally determined. In any action, after the judgment is pronounced, the Court cannot dismiss it because after the entering of judgment the Court may be said to be *functus officio*, for it has accomplished the purpose and fulfilled its function of making a determination in regard to the merits of rival claims of parties. As stressed above, after the stage of judgment, in any given case, it is correct to say that all that the Court does, is done, more or less in a ministerial capacity, that is, the Court merely enforces by execution what has been already determined by judgment. In a partition case, after the interlocutory decree is entered, what remains to be done, in fact, the only major step that remains to be taken – is issuing the commission to a surveyor to partition the land which step, it is obligatory on the Court to take in a ministerial capacity, because that is a step that the Court takes in the manner laid down in the Partition Law in obedience to a mandate of legal authority without regard to the exercise of its own judgment upon the propriety of the act being done. IN A PARTITION ACTION THE COURT CAN DISMISS THE ACTION AFTER THE STAGE OF JUDGMENT/INTERLOCUTORY DECREE AS PROVIDED FOR BY SECTION 29 (3) OF THE PARTITION ACT, ONLY AND ONLY IF THE COSTS OF THE FINAL SCHEME OF PARTITION ARE NOT DEPOSITED BY THE PARTY ORDERED OR PERMITTED DO SO AND FOR NO OTHER REASON. In fact, if not for this provision, ie 29 (3) of the Partition Law, enabling the dismissal of the action after the interlocutory is entered, no partition action could have been dismissed under the law after the entering of the judgment. It is suprising that no one made any reference to this all-important section, ie 29 (3) of the Partition Law at the hearing before us. The only explanation seems to be that the learned counsel who argued this

matter seem to have taken too literally the maxim or rather the fiction that everyone is presumed to know the law. Perhaps, one cannot conceive of a fiction more fictitious than that. In this regard, it is worth pausing to note that the binding force and the degree of finality conferred on both the interlocutory decree and the final decree in a partition case, as pointed out above, is the same in terms of sections 48 (1) and (3) of the Partition Act, and if a partition action can be dismissed, after judgment, for want of diligence in prosecution, it can arguably be said even the final decree in a partition action ought to be vacated and the action dismissed even after the final decree was entered, if the final decree has been so entered, after inordinate delay and although the final decree had been entered yet the action had not been prosecuted with due diligence – in that it had been prosecuted by fits and starts – this case in hand being a shining example, if not a memorable one, of a case being prosecuted in a leisurely manner or at a leisurely pace.

Just as much as an action cannot be withdrawn after judgment, so also an action cannot be dismissed after judgment, on the ground of non-prosecution.

As a final note, I must say this, ie that a Judge, as somebody had said, must have two salts – the salt of wisdom, lest he be insipid (or foolish) and the salt of conscience, lest he be devilish. If I had the heart or had been unfeeling enough to dismiss this action, in the peculiar circumstances of this case, as suggested by the learned counsel for the 9A, 51A, 53, 54 and 55 defendants-appellants, I would, for certain, be considered devilish; and I trust that this order satisfies to some degree, at least, the criteria spelt out above.

The appeal of the above-mentioned defendants-appellants against the order dated 26. 5. 1988 of the learned District Judge is hereby dismissed with costs fixed at Rs. 6,300.

HECTOR YAPA, J. – I agree.

Appeal dismissed.