

FERNANDO v. FERNANDO.

D. C., Colombo, C 7,132.

1897.

December 10
and 14.

Civil Procedure Code, s. 406—Withdrawal of an action with liberty to bring fresh action—Dismissal of action—Res judicata.

The power of a Court to dismiss, or allow the withdrawal, of an action, with liberty to re-institute the case on the same cause, can be used only on sufficient grounds set forth in the order itself.

Where the Court below did not state the special circumstances which seemed to it to justify the grant of permission to re-institute the case, but it appeared to the Supreme Court that there were good reasons for it—*Held*, that the plea of *res judicata* raised by the defendant against the new suit should not be upheld, and that the plaintiff should be allowed to proceed to trial.

PLAINTIFF brought action No. 5,864 in the District Court of Colombo for a declaration of title and restoration to possession of a divided portion of a certain land. At the trial it was discovered that the plaintiff's deed upon which he based his title conveyed to him only an undivided portion of the land. Plaintiff's counsel thereupon moved to amend the plaint as follows:—
“That the plaintiff, although he purchased an undivided portion
“by his deed, really purchased a divided portion, and that he
“and his predecessors in title were in possession of a divided portion.”

The Acting District Judge (Mr. Grenier) disallowed the motion, and held that he had no alternative but to dismiss the plaintiff's action, inasmuch as the amendment suggested would have the effect of varying the terms of the conveyance and making it convey a divided portion, when in fact it conveyed an undivided portion. He however added, “Under the special circumstances
“of this case, I give leave to the plaintiff to institute a fresh action,
“if so advised.”

The plaintiff relying on this permission did not appeal against the dismissal of the action, but instituted the present action supplying the defects, when the defendant pleaded the judgment of dismissal in action No. 5,864 as *res judicata* in bar of the plaintiff's present action. The case came on for hearing before the permanent District Judge (Mr. Browne), who upheld the plea of *res judicata* and dismissed the action.

The plaintiff appealed.

Dharmaratna, for appellant.

Sampayo, for respondent, cited, D. C., Galle, 2,538 (*Civil Min.*, 5th April, 1895), and *Watson v. Collector of Raj Shaye* (XIII., *Moore, J. A.*, 160).

1897. 14th December, 1897. LAWRIE, A.C.J.—

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By the 406th section if the Court be satisfied that there are sufficient grounds for permitting a plaintiff to withdraw from an action with liberty to bring a fresh action for the subject-matter of the action, the Court may grant such permission on such terms as it thinks fit.

In the action 5,864 the Acting District Judge of Colombo refused to allow an amendment of the plaint, and held that he had no alternative but to dismiss the action, and entered a decree dismissing with costs, and added, "under the special circumstances of the case I give leave to the plaintiff to institute a fresh action, if so advised."

When the plaintiff brought the present action relying on that permission the defendant objected, pleading *res judicata*. The District Judge (not he who had given the permission) held the new action to be incompetent, that there had been no withdrawal under the 406th section, and that by the passing of the decree of dismissal the right claimed became a *res judicata*, which could not afterwards be made the subject of action for the same cause between the same parties (see section 207 of the Code). He relied on a judgment of this Court in D. C., Galle, 2,528, but it seems to me that the circumstances of that case were not on all fours with this.

The power of a Court to allow the withdrawal of an action, with liberty to re-institute on the same cause, can be used only on sufficient grounds which ought to be recited in the order. The Acting District Judge in 5,864 did not state the grounds on which he was satisfied: he merely said, "in the special circumstances of this case I allow," &c.

These circumstances do not now appear to me to have been very special. I feel that it would have been better had the District Judge either allowed the amendment asked for by the plaintiff, or dismissed the action without permission, but it cannot be said there were no grounds for the permission; and as the plaintiff acted on the footing that the District Judge exercised a power which he possessed, and relying on that permission, did not appeal against the dismissal of the action, I am of the opinion that we should read the District Judge's order favourably, and sustain the permission given in the former action and permit this action to proceed to trial. I would set aside and remit for trial; the plaintiff to have the costs of the discussion in the District Court and the costs of appeal.

WITHERS, J.—I agree.