

UKKU MENIKA *et al* v. LAPE.

C. R. Matale, 4,131.

1903.

*May 14 and
June 6.*

Civil Procedure Code, s. 406—Dismissal of action after trial—Permission to bring fresh action—Validity of such order—Fiscal's transfer in favour of a dead person—Validity of such deed.

Where a Judge without calling on the defence dismissed an action *rei vindicatio* on the ground that the plaintiff had failed to make out his title but, about a week after such dismissal, gave the plaintiff liberty to re-institute the action—

Held, that the order giving the plaintiff liberty to re-institute the action was inoperative, as being made without jurisdiction, and that the said order did not prevent the defendant from successfully raising the plea of *res judicata*, if sued again on the same cause of action.

Held also, that a Fiscal's transfer in favour of a dead person was invalid and inoperative.

THE facts fully appear in the judgment of Grenier, A.J. The case was argued in appeal on 14th May, 1903.

H. A. Jayawardene, for defendant, appellant.

Van Langenberg, for plaintiffs, respondents.

Cur. adv. vult.

1908. June 6, 1908. GRENIER, A.J.—

May 14 and
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This was an action by the plaintiff for a declaration of title to an undivided three-fourths of the land described in the plaint. One Punchirala Korala, on a writ against the defendant in case No. 10,601, issued from the Village Tribunal of Matale North, purchased the whole land. He, it was alleged, by deed dated the 30th July, 1894, gifted an undivided half to the plaintiffs, who claim another one-fourth as his children by a second marriage.

The defendant answered denying that Punchirala Korala became the purchaser under writ No. 10,601, and amongst other matters pleaded that the subject-matter of this action was inquired into and determined in C. R., Matale, No. 3,603, and plaintiff's action was dismissed with costs. In other words, the defendant asserted that the judgment and decree in that case operated as *res judicata* and estopped the plaintiffs from maintaining the present action.

Now, on looking into the previous case No. 3,603, I find that the action was by the same plaintiffs as in the present one against the same defendant, but with the addition of her husband. The purchase at the Fiscal's sale was pleaded as the source of Punchirala Korala's title, and the plaintiffs claimed a half of the land by gift from him. At the date of the institution of the first action Punchirala Korala was alive, because in the present action the plaintiffs claim one-fourth by inheritance from him, averring that he died about two years ago. It is not pretended that Punchirala Korala had any other title but the one he was said to have got by purchase at the Fiscal's sale, and the cause of action seems to be identical in both cases.

The first action was dismissed by the Commissioner in the following terms:—

“ I will not call on the defendant to adduce evidence. In the absence of any documentary evidence to prove the Fiscal's sale, I am not prepared to attach any importance to the evidence adduced by the plaintiffs.

“ Plaintiffs' case dismissed with costs.”

There was no appeal from the judgment. It was asserted in the petition of appeal that a week after this judgment was pronounced the Commissioner added a footnote to his judgment which runs as follows:—“ If the plaintiff obtain a Fiscal's transfer, he can re-institute a fresh case on payment of all costs in this case.” I have looked into the case No. 3,603, and I find that the assertion is correct.

The question then arises, whether the Commissioner had the power to make the order in question, and in the circumstances in

which he made it. Now section 406 of the Civil Procedure Code enacts as follows:—" If, at any time after the institution of the action, the Court is satisfied on the application of the plaintiff (a) that the action must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit."

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The words are very clear, and it goes without saying that the section cannot be made applicable to the present case, where the case went to trial and the plaintiff's action was dismissed. There was no application by the plaintiffs to withdraw the action with liberty to re-institute a fresh action, but, on the contrary, the plaintiffs elected to go to trial on the merits, and the action was after such trial dismissed. The Commissioner had no power thereafter to make any order allowing the plaintiff liberty to re-institute another action. The plaintiff's remedy lay by way of appeal, which they did not avail themselves of. I hold, therefore, that the defendant's plea of *res judicata* should have been upheld.

The learned counsel for appellant pointed out to me that the Commissioner had misapprehended the object with which the defendant's Proctor referred to the judgment of Mr. Justice Lawrie in D. C. Kandy, 8,298. I understand that the judgment therein was to the effect that a transfer in favour of a dead man was invalid and inoperative, and that the Fiscal's transfer in the present case having in point of time been executed after Punchirala Korala's death, that judgment applied. On this ground, too, the plaintiff's action must fail.

The Commissioner appears to have been under another misapprehension as regards the order of this Court on the first appeal. This Court decided nothing by its order. It only dismissed the appeal on the ground that the order was not an appealable one. The order, if it may be described as one, consisted simply of an expression of opinion on the part of the Commissioner in regard to one of the issues, and the appeal was therefore dismissed.

For the reasons I have given, the judgment of the Court below must be set aside, and the plaintiff's action dismissed with costs.