[FULL BENCH.]

1906.
December 4.

Present: Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

CORNELIS APPUHAMI *v.* APPUWA *et al.*

C. R., Kegalla, 7,362.

Supreme Court—Power to dismiss action with liberty to re-institute—Inherent powers of Supreme Court—Courts Ordinance (No. 1 of 1889), ss. 39 and 40—Civil Procedure Code, ss. 207, 406, and 773.

The Supreme Court, in its appellate jurisdiction, has power in dismissing an action to give the plaintiff liberty to bring a fresh action on the same cause of action.

Where such permission has been granted it is not competent for the defendant to raise the plea of *res judicata.*

THE plaintiff sued the defendants for a declaration of title and ejectment in respect of a land called Etikehelwarayehena in case No. 6,471 of the Court of Requests of Kegalla. The Commissioner having given judgment for the plaintiff, the defendants appealed. In appeal the Supreme Court did not consider that the plaintiff had satisfactorily established his title, and accordingly the judgment of the Commissioner was set aside and the plaintiff's action was dismissed, with liberty to the plaintiff to bring another action if he was so advised. The plaintiff thereupon instituted the present action. The defendants pleaded the previous judgment in bar of the present suit. The Commissioner (P. E. Pieris, Esq.) made the following order:—

"C. R., 6,471, was between the same parties and on the same cause of action as the present; in that case the Commissioner gave judgment for the plaintiff; in appeal this decree was set aside and the plaintiff's action dismissed, with liberty to the plaintiff to bring another action if he was so advised.

"I am now asked to regard the decree in appeal as a final order of dismissal, and to regard the liberty reserved to the plaintiff as so much surplusage. The Supreme Court judgment runs: 'I do not think that the plaintiff has satisfactorily established his title to the land.' In view of the case quoted from 13 *Moore* 160 in O'Kinealy's Civil Procedure Code, I think Mr. Pieris' contention is right. I accordingly hold that plaontiff is not entitled to bring this action, which is dismissed with costs."

The plaintiff appealed.

1906
December 4.

A. St. V. Jayewardene, for plaintiff, appellant.—The judgment cited by the Commissioner does not support the defendants' contention. In *Watson & Co. v. The Collector of Rajshahye* (1), which is the case relied on, the Privy Council did not hold that the High Court in India had no power to dismiss an action with liberty to institute a fresh action, nor did it hold that even the subordinate Courts had no such power. What was held in that case was that if any Court exercised this power, the High Court would be entitled to inquire into the propriety of the reservation when all the circumstances are before them. The powers of the Supreme Court of Ceylon sitting in appeal are to be found in sections 39 and 40 of the Courts Ordinance and in section 773 of the Civil Procedure Code. It will be competent to the Supreme Court to make such an order as the one in question in appeal, as section 40 empowers it "to pass such judgment, sentence, decree, or order therein between and as regards the parties.....as the Supreme Court shall think fit," and it has been held that under Rule No. 4, Order No. 58, which empowers the Court of Appeal in England ".....to bear inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require ....." judgment might be passed for the defendant, leaving it open to the plaintiff to bring another suit for the same cause of action; *Pinto v. Badman* (2). The appeal Court in Ceylon, which possesses powers similar to those of the English Court of Appeal, ought to have the power to make a similar reservation. In *Watson & Co. v. The Collector of Rajshahye* (1) (*ubi supra*) it was laid down that the Courts of Equity in England have the power to make such a reservation, the Supreme Court in this Colony having all the powers of the Superior Courts at Westminster [*In re Ferguson* (3); *In the matter of the election of a Councillor for the Galupiyadda Ward of the Galle Municipality* (4)] should also have the same power. In the first case the defendant accepted the reservation without objection, and is now estopped from raising the plea of *res judicata* [*Rajib Sarkhel v. Nilmonee Sing Deo* (5)]. It may also be treated as an order under section 406. In this particular case, can the lower Court review or question the order of this Court, even if made without jurisdiction?

Sampayo, K.C., for defendant, respondent.—The provisions of sections 39 and 40 of the Courts Ordinance are intended only to define in general terms the powers of the Supreme Court, but do not over-ride the special provisions of the Civil Procedure Code, which, it is submitted, are imperative as to the finality of decrees. It appears to be admitted that the reservation in the judgment of the Supreme Court is not justified by section 406 of the Civil Procedure Code.

(1) (1860) 13 *M. I. A.* 160.
(2) 8 *R. P. C.*
(3) (1874) 1 *N. L. R.* 181.
(4) (1905) 8 *N. L. R.* 300.
(5) 20 *W. R.* 440.

1906. December

As a matter of fact the Supreme Court adjudicated on the title of the plaintiff and dismissed his action on the merits, and the case therefore does not come within the purview of section 406. The liberty to bring a fresh action in those circumstances would make the decree equivalent to a non-suit, which is expressly disallowed by section 207. The Supreme Court is bound by these provisions, and any order contrary thereto has no effect in law. In the Indian Civil Procedure Code there is no provision corresponding to our section 207, and yet the Privy Council in *Watson & Co. v. The Collector of Rajshahye* (1) held that the Courts in India had no such power to dismiss a case with liberty to institute a fresh action as the Court of Equity in England exercised. He also cited *Sukh Lal v. Bhikhi* (2) and *Cursandas Natha v. Ladka Vahu* (3).

Cur. adv. vult.

4th December, 1906. HUTCHINSON C.J.—

The plaintiff had previously sued the defendants for the same cause of action. He obtained judgment in that action, but the Supreme Court on appeal dismissed the action, "giving the plaintiff liberty to bring another action if so advised." The defendants pleaded the judgment of the Supreme Court in bar of this action, alleging that the Supreme Court had no authority to authorize the bringing of a fresh action.

Section 207 of the Civil Procedure Code enacts that "all decrees passed by the Court shall, subject to an appeal, when an appeal is allowed, be final between the parties, and no plaintiff shall hereafter be non-suited." That applies to Courts of first instance. The powers of the Supreme Court on appeals are defined in section 40 of the Courts Ordinance and section 773 of the Civil Procedure Code. These powers are not limited by section 207. It is empowered by the Courts Ordinance "to pass such judgment between and as regards the parties as it shall think fit." The Supreme Court, following the spirit of section 207, ought, as a rule, either to make such order as the Court below ought to have made, or else to put the matter in train, as, for example, by directing a new trial or the taking of further evidence, so that the dispute may be finally settled in the action with which the Court is then dealing. It cannot, however, be said that it has no power to make such an order as was made in this case; and, besides, it would be wrong for this Court, and still more wrong for an inferior Court, to set aside or treat as *ultra vires*, a judgment given by the Supreme Court. So long as the judgment stands unreversed by a higher Court, it should be regarded as binding.

I think that the appeal should be allowed, and the case be sent back for trial.

(1) (1860) 13 *M. I. A.* 160. (2) *I. L. R.* 11 *All* 187.
(3) *I. L. R.* 19 *Bom.* 571.

1906. *December 4.*

WENDT J.—

This case involves an important question as to the right of an unsuccessful plaintiff to sue again, and has therefore been referred to a bench of three Judges. It is unnecessary for me to recapitulate the facts, which are sufficiently set out in the judgment of my brother Middleton. The respondent's case involves the contention that the order of this Court on the former appeal, giving plaintiff leave to sue again, was nugatory as made without jurisdiction. That is the view which the Commissioner took, and I agree with my brother's view as to the impropriety of the Commissioner presuming to review the order of the Supreme Court. That was an order made in contemplation of the very action he was trying, and his duty was to obey it, leaving it to the defendant, if so advised, to raise the question of its validity before this Court. The order is one which is commonly made in practice in this Court, and it is desirable that there should be no uncertainty as to its effect.

In my opinion the order of Mr. Justice Moncreiff may be regarded as one made under section 406 of the Code of Civil Procedure. That section is a reproduction of section 373 of the present Indian Code. In the former Indian Code (Act VIII. of 1859) the words were " at any time before final judgment. " The substitution for these of the words " at any time after the institution of the suit " adopted in our Code is significant, and it appears to be settled in India that the permission to withdraw and sue again may be given by an Appellate Court as well as the Court of first instance. The Court, in granting such permission, should properly record its reasons, which would involve its opinion on the material put before it by the plaintiff, and this opinion would ordinarily be that if a decision had to be given on it the action must be dismissed. Respondent contends that that is as far as he could go under section 406, that if it went further and said " the action is dismissed, but I permit plaintiff to sue again, " it would be fatal to the validity of the order. The objection is not one of substance, but of form merely; for if this Court's attention had been drawn to the formality of such an objection being thereafter preferred, I have not the least doubt that the order would have been expressed in different words. That is, I think, clear from the judgment of Moncreiff J. Looking, then, to the substance of the order in question, I think it is authorized and justified by section 406.

I agree with appellant's counsel in thinking that the decision of the Privy Council, cited to us, did not involve the adjudication that such an order was beyond the competency of even the Indian High Courts. The powers conferred upon this Court by section 40 of the Courts Ordinance are wider than those possessed by the Indian High Courts in their appellate jurisdiction.

I think, therefore, that the appeal should be allowed with costs.

MIDDLETON J.

1906.
December 4.

This was an appeal referred to the Full Court for decision of the point whether the Supreme Court has the power, in dismissing an appeal, to reserve a right to the plaintiff to bring a fresh action for the same cause.

Judgment was given by this Court in C. R., Kegalla, 6,471, on an appeal by the defendants, dismissing the plaintiff's action on the ground that he had not satisfactorily established his title to certain lands, but giving him leave to bring another action if so advised.

The plaintiff accordingly brought the present action, and upon the case coming up for settlement of issues, defendant's proctor objected that the action was *res judicata*, and that the order of the Supreme Court was *ultra vires*, and quoted *Watson & Co. v. The Collector of Rajshahye et al.* (1).

The Commissioner, on the authority of that case, dismissed the plaintiff's action, and thereupon this appeal.

In the case quoted it is worthy of observation that the Privy Council judgment states at page 170 that their Lordships are aware of no case, other than the case they were then dealing with, in which, upon an issue joined, the party having failed to produce the evidence he was bound to produce in support of that issue, liberty has been given to him to bring a second suit.

Their Lordships appeared also to think that if a Judge of any of the Indian Courts had such a power of reservation, and without laying down that no Judge had, the decree, though not appealed against, was not binding on the High Court, which in a case in which it was pleaded as *res judicata* might properly consider the propriety of the reservation.

The judgment of the Privy Council, therefore, points to the conclusion that, where a decree in the nature of a non-suit was formerly entered by Courts of Equity, it was only where the suit failed on some point of form; and secondly, that the unappealed against decision of a lower Court may be questioned by a higher Court, where its propriety comes in issue in a subsequent suit, if all the circumstances are before that Court.

Non-suits in their full sense in the English Courts are done away with by Order 26, leaving the matter to the discretion of the Judge, but although the term " non-suit " is still used, it is in the sense of judgment for the defendant (2).

In the present case the order of the Supreme Court granting the reservation was an order made not on a point of form, but because, after issue settled, the plaintiff had failed to prove his title, and the Court was not satisfied with the title of the defendant.

To my mind this is a state of affairs which might occasionally occur in the Courts of Ceylon either through the ignorance of suitors

(1) (1860) 13 *M. I. A.* 160. (2) (1907) *Annual Practice, Vol.* II., *p.* 405.

1906.
December 4.
MIDDLETON J.

or indolence of their advisers in the lower Court, and, in my opinion, the power to reserve the right to bring a fresh action under such circumstances is one which might properly and in fact ought to be exercised on fit occasions by the Supreme Court for the prevention of what would otherwise be a failure of justice.

The question is, however, whether the Supreme Court has such a right. In my opinion it has. I do not think that the powers of an Appellate Court in India referred to by counsel for the appellant in quoting section 582 of the Indian Code of Civil Procedure are any criterion of the powers of the Supreme Court of Ceylon, as an Appellate Court in India is by no means always the High Court.

The powers of the Supreme Court of Ceylon are to be found in sections 39 and 40 of the Courts Ordinance of 1889, and include in section 40 " the right to pass such judgment ..... therein between and as regards the parties or to give such direction to the Court below.....as the Supreme Court shall think fit. "

Under the powers granted to the Appeal Court in England under Order 58, Rule 4, which include a power to make any order which ought to have been made, and to make such further or other orders as the case may require, it has in the case of *Badman v. Pinto* (1) held (2) that a non-suit is not a form of judgment applicable to a case before the Court of Appeal, but that it can, if it thinks fit, give judgment for the defendant in such a form as will enable a fresh action to be brought.

In my judgment the powers of the Supreme Court of Ceylon are amply wide enough to enable it also to act in the manner assumed by the Appeal Court in England.

It is true, as counsel for the respondent urges, that such an order is not an order under section 406 of the Civil Procedure Code, but the fact that section 207 is unique and so stringent in its terms is, I think, an additional reason why the Supreme Court was intended to have the power contended for by the appellant's counsel.

This Court could no doubt, if it chose, act under section 406 of the Civil Procedure Code, or exercise its power under section 40 of the Courts Ordinance of ordering a new trial, but the power to act in the way objected to by the respondent is a power that, I think, is within the terms of that section also.

In my judgment the Commissioner of Requests had no right and ought not to have acted in contravention of the order of the Supreme Court, but should have noted the objection taken to it in his Court and proceeded to hear the case, leaving it to the party affected by that order to make his appeal in the ordinary way, and obtain the sense of the Supreme Court on its own order.

(1) 8 *R. P. C.* 181. (2) (1907) *Annual Practice, Vol. II., p.* 811.

1906.
December 4.
MIDDLETON J.

The action of the Commissioner, in deciding as he has done, is practically an assumption of a right to decide as to the validity of orders of this Court, which it is his duty to obey and carry out, and not to question.

Taking this view of the powers of this Court under section 40, it is not necessary to consider the other points as to inherent jurisdiction and estoppel.

I would allow the appeal with costs, and direct the Commissioner to proceed to the hearing of the action, the respondent paying all the appellant's costs to date in the Court below.

Appeal allowed; case remanded.