1931

[IN THE PRIVY COUNCIL.]

Present: **Lord Sankey, L.C., Lord Blanesburgh, Lord Darling and Lord Thankerton**

S. P. A. ANNAMALAY CHETTY *v.* THORNHILL

Res judicata—Action for goods sold and money lent—Plaintiff's business name not registered—Decree in favour of plaintiff—Appeal by defendant—Second action by plaintiff after registration—Civil Procedure Code, s. 207.

The plaintiff sued the defendant on a running account in respect of money advanced and goods sold and delivered. The defendant pleaded that the plaintiff had not registered his business name as required by Ordinance No. 6 of 1918. The District Judge entered decree in favour of the plaintiff, ordering him to furnish the necessary particulars for the registration of his business name within fourteen days. Pending an appeal by the defendant, plaintiff registered his business name and brought a second action for the recovery of the same sum of money. The District Judge dismissed the second action on the ground that it was barred by the decree in the first.

Held, that the decree in the first action, from which an appeal was pending, was no bar to the second action.

No decree, from which an appeal lies and has in fact been taken is final between the parties so as to be *res adjudicata*.

APPEAL from a judgment of the Supreme Court.

May 19, 1931. Delivered by LORD THANKERTON.—

This appeal is from a decree of the Supreme Court of the Island of Ceylon, dated March 13, 1928, confirming a decree of the District Court of Ratnapura, dated August 31, 1927, and made in Action No. 4,687 in which the appellant is plaintiff, and the only question in the appeal is whether the suit is barred by reason of the proceedings in a former suit by the appellant against the respondent, which was Action No. 4,122 in the same Court.

Action No. 4,122 was instituted by the appellant on June 19, 1924, to recover a balance alleged to be due by the respondent upon a running account in respect of monies advanced and goods sold and delivered, with interest to the date of the suit. The suit was instituted in the name under which the appellant carried on business, and the respondent *inter alia* pleaded that the appellant was precluded from enforcing his rights under the contract set out in the plaint, as he had failed to register his business name as prescribed by the Business Names Registration Ordinance, No. 6 of 1918. Section 9 of that Ordinance provides as follows:—

"Where any firm or person by this Ordinance required to furnish a statement of particulars or of any change in particulars shall have made default in doing so, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of

such defaulter in relation to the business, in respect of the carrying on of which particulars were required to be furnished, shall not be enforceable at any time while he is in default, by action or other legal proceedings, either in the business name or otherwise."

After protracted procedure in Action No. 4,122, the District Judge on January 17, 1927, made a decree under which the appellant was ordered to furnish to the Registrar within fourteen days from the date thereof the necessary particulars for the registration of his business name, and the respondent was ordered to pay to the appellant, on the latter's compliance with the said order as to registration, the sum of Rs. 54,577.46 with interest as prayed for in the plaint, and the respondent was awarded Rs. 5,000 with interest thereon in satisfaction of his claim in reconvention, and the respondent was ordered to pay the larger part of the costs of the action. On January 19, 1927, the respondent filed an appeal against that decree to the Supreme Court, in which he *inter alia* still maintained his defence founded on the appellant's non-registration of his business name. While this appeal was pending the appellant complied with the requirements of the Business Names Registration Ordinance.

Being faced with the possibility that, if the respondent's appeal succeeded, any further proceedings might be barred by limitation, the appellant made an application to the Supreme Court on March 10, 1927, to advance the hearing of the appeal, which was successfully opposed by the respondent.

In this situation, the appellant instituted the present suit—Action No. 4,687—on June 2, 1927, in the District Court of Ratnapura. The amount claimed in the plaint was the same as in Action No. 4,122, with the addition of further interest. The respondent filed his written answer on July 5, 1927, in which he pleaded *inter alia* as matter of law " that the Action No. 4,122 of this Court and the decree entered of record therein are a bar to this action. " It is unnecessary to detail the manœuvres of the parties in the procedure which ensued; it is sufficient to state that the appellant unsuccessfully sought to have the trial of the second action adjourned until after the decision of the respondent's appeal in the first action. Issues of law were adjusted in the second action as follows:—(1) Is this action barred by the Action No. 4,122 of this Court and the final decree entered of record therein? and (2) Is there a decree that can operate as a bar to the action in Decree of Court No. 4,122? On August 31, 1927, the District Judge upheld the respondent's plea and dismissed the action (No. 4,687). The present appellant appealed from that decree to the Supreme Court on September 8, 1927.

On October 21, 1927, the Supreme Court pronounced judgment in the respondent's appeal in Action No. 4,122, allowing the appeal and dismissing the action on the sole ground of the present appellant's failure to comply with the requirements of the Registration of Business Names Ordinance.

On March 13, 1928, the Supreme Court delivered judgment on the present appellant's appeal in the second action (No. 4,687), dismissing the appeal with costs. This appeal is from that decree, and the only question for their Lordships' decision is whether on June 2, 1927, the appellant was barred from instituting the present suit because he then held the decree of the District Judge in his favour in Action No. 4,122, though the respondent's appeal therefrom was then pending. The parties in the two suits are the same and the subject-matter may be taken to be the same.

The District Judge concluded in the respondent's favour on the ground that the decree in Action No. 4,122, though subject to appeal, was final and enforceable. In the Supreme Court Schneider S.P.J., with whom Lyall Grant J. agreed, appears to have proceeded on two alternative views, viz., that the present appellant's cause of action had been merged in and superseded by the decree, or otherwise that in both actions the appellant was seeking to recover the same debt, and that, as he could not get decree for the same debt twice over, he was not entitled to maintain the second action at all. The learned judge found it unnecessary to decide a question raised under section 207 of the Civil Procedure Code of Ceylon, to which their Lordships will now refer.

Section 207 of the Civil Procedure Code, 1889, provides as follows:—

> "All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall be non-suited."

The appellant maintained that, under this provision, no decree, from which an appeal lies and has in fact been taken, is final between the parties so as to form *res adjudicata*, while the respondent contended that such a decree was final between the parties and formed *res adjudicata* until it was set aside on appeal. In their Lordships' opinion the former view is the correct one, and where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res adjudicata* as between the same parties. The opinion of the learned judges of the Supreme Court clearly inclined to the same view, and their Lordships have a difficulty in appreciating why the learned judges found it unnecessary to decide this point, for this view still leaves it open to the Court to see that the appellant does not get decree twice over for the same sum, and it is inconsistent with the other ground expressed by them for their decision that the appellant's cause of action had been merged into the decree in Action No. 4,122, since, according to this view, that decree was not final. Their Lordships regret that the second action was not adjourned pending the decision of the appeal in the first action, as that would have simplified procedure and saved expense.

Accordingly, Their Lordships are of opinion that the appeal should be allowed and that the decree of the District Judge dated August 31, 1927, and the decree of the Supreme Court on that judgment dated March 13, 1928, should be recalled, the appellant to have the costs of this appeal, except the costs of his petition for the admission of additional

documents in relation to which the respondent should have his costs, and as to which there should be a set-off, that the appellant should have his costs in relation to the issues of law on which the decree of August 31, 1927, was pronounced, and of the appeal from that decree to the Supreme Court, and that the action should be remitted to the District Court of Ratnapura to proceed as accords. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.