1942

Present : **Howard C.J. and Soertsz J.**

KANAPATHIPILLAI *v.* KANDIAH

384—D. C. Batticaloa, 334.

Res judicata—*Action on mortgage bond—Assignment of bond by person not authorised in writing—Dismissal of action—Fresh action after valid assignment—Civil Procedure Code s. 406.*

Plaintiff sued the defendant in case No. 141 D.C., Batticaloa, to recover a sum of money on a mortgage bond given by the defendant in favour of a Corporation. The bond was assigned to the plaintiff by a person who was not authorised in writing to do so, as required by section 54 of the Joint Stock Companies Ordinance.

At the trial, the plaintiff admitted that there was no such writing and withdrew his action paying defendant's costs. The Judge recorded that the plaintiff's action was dismissed with costs.

The plaintiff sued on the bond in the present action after obtaining a valid assignment.

Held, that the action was not barred by section 406 of the Civil Procedure Code.

APPEAL from a judgment of the District Judge of Batticaloa.

H. V. Perera, K.C. (with him *C. T. Olegasegaram*), for the plaintiff, appellant.

N. Nadarajah, K.C. (with him *G. Thomas* and *P. Malalgoda*), for the defendant, respondent.

Cur. adv. vult.

November 2, 1942. HOWARD C.J.—

The plaintiff appeals from a decision of the District Judge, Batticaloa, dismissing his action with costs. His decision is based on his finding that the decree in case No. 141M D.C. operates as *res judicata.* In the present case the appellant claims a sum of Rs. 945, together with interest by virtue of a deed of assignment dated November 6, 1939, made by the Ceylon Financing Corporation, Batticaloa, in his favour of a bond dated January 16, 1935, by which the respondent mortgaged and hypothecated with the said Corporation certain properties in the District of Batticaloa. In case No. 141M D.C. the appellant claimed a sum of Rs. 780, with interest on an assignment by the said Corporation dated August 24, 1937. The action on the former claim came before the District Court of Batticaloa on August 13, 1938, when Counsel for the respondent, then the defendant, stated as follows:—

"The main point is this. One Ragel assigned the bond in question on behalf of the Company in plaintiff's favour. Section 54 of No. 4 of 1861 says that a Joint Stock Company can authorise a person in writing to execute deeds on its behalf."

Plaintiff's Counsel then admitted that there was no such written authority and hence assignment bond in plaintiff's favour was invalid. He then withdrew the action, paying costs of contest. The District Judge further recorded that the action was dismissed with costs.

As in the District Court, Counsel for the respondent has relied on the provisions of section 406 of the Civil Procedure Code. This section is worded as follows:—

"406. (1) 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.

(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

(3) Nothing in this section shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others."

It is contended that the subject-matter of this action is the same as in action No. 141M D.C. and as the appellant withdrew from the latter action without liberty to bring a fresh action for the subject-matter of the action, he is precluded from bringing a fresh action. It is also maintained that as the District Judge dismissed the action, the whole matter is *res judicata.*

A good deal of argument has been developed with regard to the interpretation to be given to the expression "subject-matter". Can it be said that the subject-matter in the two actions is the same? The wording of the corresponding provision in the Indian Procedure Code—Order 23 Rule 1—is similar. At *page 2170* of the *Second Volume of Chitaley* it is stated that the term "subject-matter" means the plaintiff's cause of action for his suit, and a suit for a different cause of action is, therefore, not barred under this rule even though the suit may relate to the same property. Conversely, a suit based on the same cause of action as the first one is barred. The question, therefore, arises whether the two suits were based on the same cause of action. In this connection our attention was invited by Mr. Perera to two Indian cases, *Bhagaban Das Mahesri v. Prosanna Dev Raikot* [1] and *Pandillapalli Singha Reddi v. Yeddula Subba Reddi* [2]. In the Calcutta case, it was held that, where a suit for possession from tenants-at-will has been withdrawn without permission to bring fresh suit, as no notice had been served to the heirs of one tenant, who had been served with notice, but had died before the institution of the suit, a subsequent suit for same relief after proper notice to all the parties is not barred under Order 23 Rule 1(3). In the Madras case the reversioners of a Hindu widow sued, during her lifetime, for a declaration that an alienation made by her was not binding on them. The alienee, in defence, pleaded that he was the *illatom* son-in-law of the last male owner. The widow having died during the pendency of the suit, the plaintiffs withdrew the suit and subsequently brought a suit for possession of the property alienated. It was held that the second suit was not barred by the provisions of Order 23 Rule 1(3). It will be observed that, in this case, as in the Calcutta case, the reliefs claimed in both suits were the same, namely, the relief in the shape of recovery of land. So, in the present case, the reliefs claimed in both suits are the same, namely, the recovery of a sum of money due on a mortgage bond. In the Madras case the following view was taken:—

> "Without attempting an exhaustive definition of all that may be included in the term 'subject-matter' it should be held that where the cause of action and the relief claimed on the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit within the meaning of Order 23 Rule 1(3)."

This view was contrary to the decision in the case of *Achuta Menon v. Achutan Nayar* [3], which was overruled. In *Chenchuram Naidu v. Bahavuddin Sahib* [4], which was a case in which the plaintiffs as landlord had

[1] *A. I. R. (1934) Cal. 433.*
[2] *A. I. R. (1917) Mad. 512.*
[3] *(1898) 21 Mad. 35.*
[4] *A. I. R. (1933) Mad. 139.*

instituted a suit in ejectment against a tenant but the suit was allowed to be withdrawn on the ground that there was absence of the requisite notice to quit but no liberty was reserved to the plaintiff to issue a fresh suit and thereafter the plaintiff instituted another suit after having given the necessary notice, it was held that the second suit was not a suit in respect of the same subject-matter because the word subject-matter in Order 23 Rule 1 means :—

> "the series of acts or transactions alleged to exist giving rise to the relief claimed."

In the present case the first series of acts or transactions which formed the basis of the first suit was incomplete or the appellant would have been able to prosecute his suit to decree. It was incomplete because the assignment by Ragel was invalid. The second series of acts or transactions is complete because the assignment is made in accordance with law and, therefore, the two suits are not in respect of the same subject-matter. In my opinion, it is impossible to distinguish the present case from the Indian cases I have cited. In these circumstances, the learned Judge should not have dismissed the suit by reason of the provisions of section 406 (2) of the Civil Procedure Code.

Counsel for the respondent has also contended that as the first suit was dismissed by the Judge the whole matter is *res judicata*. I am unable to accept this contention. The law with regard to *res judicata* was expounded by Jayewardene A.J. in *Sinniah v. Eliakutty* [1] in the following passage :—

> "Our law of *res judicata*, which is founded on the Civil law. . . . *res judicata dicitur quae finem controversiarum pronuntiatione judicis accepit, quod vel condemnatione vel absolutione contingit* . . . . (*Digest XLII.I,I*) is to be found in sections 34, 207, and 406 of the Civil Procedure Code, supplemented by the English law (*Samitchy Appu v. Perera*) [2]. A decree is decisive as to every right of property which can be claimed, set up, or put in issue between the parties upon the cause of action for which the action is brought, according to the explanation to section 207 of the Code.
>
> The doctrine of *res judicata* applies to all matters which existed at the time of giving the judgment and which the party had an opportunity of bringing before the Court. The conditions for the exclusion of jurisdiction on the grounds of *res judicata* are that the identical matter shall have come in question already, that the matter shall have been controverted, and that it should have been decided. If the parties have had an opportunity of controverting it, that is the same thing as if the matter had actually been controverted and decided. (*Newington v. Levy* [3])."

A further exposition of the law is to be found in the judgment of Fernando A.J., in *Ameen v. Patimuttu* [4]. In the coure of his judgment,

[1] *34 N. L. R. 37.*
[2] *3 C. A. C. 30.*
[3] *6 C. P. Cases 180.*
[4] *38 N. L. R. 264.*

the learned Judge stated that on the question of *res judicata* there is no distinction between the law of Ceylon and that of England and the provisions of sections 34, 207 and 406 of the Civil Procedure Code are not exhaustive and may be supplemented by the English law. The learned Judge then refers to the law as set out by *Spencer Bower* in his treatise on *res judicata* and cites with approval the following passage from *page 23* :—

> "Any judgment or order which in other respects answers to the description of *res judicata* is none the less so because it was made in pursuance of the consent and agreement of the parties. It is true that in such cases the Court is discharged from the duty of investigating the matters in controversy and does not pronounce a judicial opinion upon any of such matters ; but it is none the less true also that at the joint request of the parties the tribunal gives judicial sanction to what those parties have settled between themselves, and in that way converts a mere agreement into a judicial decision on which a plea of *res judicata* may be founded . . . . But though consent judgments and orders are undoubtedly decisions in the sense that the actual mandatory or prohibitive parts of the judgment is conclusively binding, it may often be a matter of legitimate doubt as to what, if any, particular questions or issues were expressly or impliedly the subject of the consent, and of the decision. For this purpose the Court will closely examine all such evidence, if any, as is available and admissible. Any issue or question which is thus shown to have been recognised or taken by the parties as the subject of the litigation, and of the judgment or order agreed to, is deemed to have been thereby conclusively determined so as to preclude any subsequent challenge. Where, however, there are no such materials available as are above indicated there is nothing which can operate as a decision of any particular question or issue, and neither party is estopped from disputting anything but the actual judgment or order itself."

The principle set out in the passage I have cited was followed in *Newington v. Levy* (*supra*). In his judgment in that case, Blackburn J. at page 193 stated as follows :—

> "I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court, But, if there be matter subsequent, which could not have been brought before the Court at the time, the party is not estopped from raising it."

Applying the law as expounded by *Spencer Bower* and the judgment in *Newington v. Levy* (*supra*) to the facts of the present case, the only issue that was decided in the first suit was the question as to whether the assignment by Ragel was valid so far as the Corporation was concerned. Neither that decision nor the judgment based thereon could subsequently be challenged. The appellant is, therefore, not precluded from bringing fresh action based on the subsequent assignment.

For the reasons I have given, the appeal must be allowed and the case sent back to the District Judge to determine issue 3, namely, "What amount, if any, is due to the plaintiff?". After determining such amount he will enter judgment for the same in favour of the plaintiff. The plaintiff must have his costs in this Court and the Court below.

SOERTSZ J.—I agree.

Appeal allowed.