1943 *Present:* **Soertsz and Hearne JJ.**

MOLAGODA KUMARIHAMY *et al.*, Appellants, *and*
KEMPITIYA *et. al.*, Respondents.

1—D. C., Kandy, 369.

Res-judicata—*Action by donee against third party claiming title from donor—Donor called upon to warrant and defend title—Decision in action between donor and donee given after sale to defendant—Privity.*

Where a donee sued a third party for declaration of title to and in ejectment of property donated to him and where the defendant in the action, who claimed title from the donor called upon the latter to warrant and defend the title conveyed by him to the defendant and made the donor a party to the action,—

***Held*, that the decision in an action between the donor and the donee given, after the sale to the defendant, in favour of the donor cannot be pleaded as *res-judicata* by the defendant in the present action.**

APPEAL from a judgment of the District Judge of Kandy.

The facts appear from the argument.

E. B. Wickremanayake (with him *H. W. Jayewardene*), for the plaintiffs, appellants.—The first and second defendants cannot plead *res-judicata* relying on the decision in case No. 143. In that case, which was instituted in March, 1939, the first and second defendants were not parties; it was an action between the present plaintiffs and R. D. Kumarihamy (the present third defendant). The first and second defendants claim title from a deed of donation granted to them by the third defendant in June, 1938. They cannot, therefore, be regarded as privies of the third defendant. A person can become the privy of another only at a time subsequent to the date of the judgment which is pleaded as *res-judicata*. Further, there is absence of mutuality between the plaintiffs and the first and second defendants; if the latter, as plaintiffs, sued the former, as defendants, the judgment in case No. 143 can never be pleaded in defence as *res-judicata*. See *Sita Ram v. Amir Begam et al*[1]; *Govindan Asari and another v. Nagayan Chetty and others*[2]; *Gooneratne v. Ebrahim*[3]; *Chinniah v. Suppramaniam et al*[4]; *Vol. 13 Halsbury's Laws of England (2nd ed.), section 454 and 487, Doe v. Martyn*[5]; *Concha v. Concha*[6].

The third defendant was not a necessary party, and her appearance does not make any difference on the question of *res judicata*. It is a plea available only to her, and not to the first and second defendants.

H. V. Perera, K.C. (with him *C. V. Ranawake*), for the first and second defendants, respondents.—The vendor and vendee, donor and donee, are, in our law, placed in contractual relations. A vendor who is brought in to warrant and defend title is a party in every sense of the word and can represent the vendee as against third parties. It is the primary obligation of a vendor to give vacant possession to the purchaser.

[1] *I. L. R. (1886) 8 All. 324 at 331.*
[2] *A. I. R. (1932) Mad. 238.*
[3] *(1910) 2 Cur. L. R. 222 at 224.*
[4] *(1929) 10 C. L. Rec. 152.*
[5] *(1828) 8 B. & C. 497 at 524.*
[6] *L. J. (1887) 56 Ch. 257 at 270, 272.*

Ratwatte v. Dullewe[1]; *Menika v. Adakappa Chetty*[2]; *Wirawardene et al. v. Ratnaike*[3]. And where the purchaser is sued by a third party he has a double shield: he can either defend himself, or he can get his vendor to conduct the defence. See *Balasuriya v. Appuhami*[4]; *Hukum Chand on Res-Judicata, sections 71,105.* The third defendant in the present case can successfully plead *res-judicata*, and the first and second defendants can avail of her success. A fideicommissary is treated as the privy of the *fiduciary—Charles v. Nonohamy et al.*[5] Similarly the vendee is the privy of the vendor.

L. A. Rajapakse for the third defendant, respondent.

E. B. Wickremanayake, in reply.—A vendor cannot represent his vendee. He merely assists the vendee when called upon to warrant and defend title, and does not convert the action into one against himself —*Punchi Appuhamy v. Rambukpotha*[6].

A sale should be distinguished from donation. Even assuming that a vendor can sue a trespasser, the law does not give a donor such a right.

Cur. adv. vult.

November 25, 1943. HEARNE J.—

The first and second plaintiffs alleged that "R. D. Kumarihamy in consideration of the marriage of the second plaintiff with the first plaintiff gave as dowry to the first plaintiff by deed 1583 (1 D7) dated December 1, 1927, and February 25, 1935, *inter alia* the lands described in Schedule A and by deed 337 (1 D8) dated March 19, 1930, *inter alia*, the lands described in Schedule B". They also alleged that first and second defendants, having no manner of right or title to the properties described in Schedules A and B, had been in wrongful and unlawful possession since June 1938, and prayed for a declaration of title, ejectment and damages. The plaint was filed on March 28, 1940.

Mr. Gunewardene entered an appearance on behalf of R. D. Kumarihamy and moved that she be added as a party defendant on the ground that she had been noticed to warrant and defend the title of the defendants. The motion was allowed.

Amongst the issues framed were the following:—

(1) Did R. D. Kumarihamy by 1 D7 and 1 D8 give as dowry to the first plaintiff the lands described in Schedules A and B?

(2) If so, are the said deeds irrevocable or are they revocable deeds for succour and assistance?

(3) Did R. D. Kumarihamy by deed 994 of June 2, 1938, donate the properties in dispute except the land No. 5 in Schedule B to the second defendant?

. . . . . .

(8) Is the judgment and decree in case No. 143 *res-judicata* of the question whether there was a promise of dowry made by R. D. Kumarihamy to the plaintiffs?

(9) Is the finding in case No. 143 also *res-judicata* upon the matters involved in issues 1 and 2?

[1] *(1907) 10 N. L. R. 304.*
[2] *(1913) 17 N. L. R. 93.*
[3] *(1920) 22 N. L. R. 219.*
[4] *(1914) 17 N. L. R. 404.*
[5] *(1923) 25 N. L. R. 233.*
[6] *(1942) 43 N. L. R. 333 at 335.*

The Judge answered issues (8) and (9) in the affirmative and thereupon dismissed the plaintiffs' action with costs. They have now appealed.

In case 143, field on March 20, 1939, the plaintiffs alleged that " R. D. Kumarihamy (the defendant) had promised and agreed with the second plaintiff that in consideration of the second plaintiff marrying the first plaintiff she would give the plaintiffs Rs. 1,200 (cash), Rs. 15,000 in immovable property and Rs. 1,000 in jewellery: that the marriage took place: that in part fulfilment of her promise to give landed property she had by 1 D7 given the first plaintiff certain lands and by 1 D8 had also given a $\frac{1}{3}$ share of certain other lands and that she had thereafter revoked 1 D8 and repudiated the agreement and promise previously made ". The plaintiffs asked for a declaration that 1 D7 and 1 D8 were irrevocable and that the defendant be ordered to settle on the plaintiffs immovable property to the value of Rs. 15,000 *less* the sum of Rs. 3,500, the value of the property referred to in 1 D7 and 1 D8.

Although the plaintiffs pleaded that the defendant (Kumarihamy) had revoked 1 D8 they probably meant that she had purported to revoke it, as credit is given to her for the value of the property described in the deed.

The following were amongst the issues framed:—

(1) Did the defendant promise to give Rs. 1,200 in cash, Rs. 1,000 worth of jewellery, and Rs. 15,000 in immovable property as dowry to first plaintiff in consideration of the second plaintiff marrying the first plaintiff?

(2) In terms of the said promise did the defendant after the said marriage execute deed No. 1583 and deed 337 and give jewellery worth Rs. 1,000 and cash Rs. 1,200 to the first plaintiff?

. . . . . .

(10) Are the deeds 1583 (1 D7) and 337 (1 D8) revocable?

They were answered against the plaintiffs whose action was dimissed on May 27, 1940.

In his judgment (I am now referring to the present case) the Judge remarked that issue (1) was substantially the same as issues (1) and (2) in case 143 and that issue (2) is the same as issue (10) in case 143. After the issues were framed he made a note to the effect that "Issues (8) and (9) relate to the maintainability of the action " and on answering these issues against the plaintiffs, as I have already said, he dismissed their action with costs.

From an examination of case 143 it would appear that, while the determination of issues (1) and (2) involved the finding that Kumarihamy did not make any promises in consideration of the second plaintiff marrying the first plaintiff and that she did not execute 1 D7 and 1 D8 *in terms of that promise* and while issue (10) decided that the deeds were revocable, there was no issue on the question of whether the deeds 1 D7 and 1 D8 had in fact at that time been revoked. In her answer in case 143 Kumarihamy admitted the execution of 1 D7 in favour of the first plaintiff out of love and affection and did not claim to have revoked it. She also admitted the execution of 1 D8 in favour of three daughters

including the first plaintiff. This she claimed to have revoked, but there does not appear to have been any issue as to whether she had done so, although in his judgment the trial Judge said " the second plaintiff now finds that both deeds have been revoked ".

It was argued by Counsel for the plaintiffs-appellants that the first and second defendants-respondents could not claim that the issues decided in case 143 between the plaintiffs and R. D. Kumarihamy were *res judicata* in their favour in a suit between the plaintiffs and themselves, for the reason that their alleged privity with R. D. Kumarihamy was anterior and not subsequent to the decision in case 143.

Counsel for the first and second defendants-respondents conceded that the general principle implied in the argument of Counsel for the appellants was against his clients unless it could be shown that, having regard to the law in Ceylon relative to vendors and vendees of land (and analogously to donors and donees where the former undertook to " warrant and defend ") a vendor, even after a sale, represented the title conveyed to a vendee, so far as third parties are concerned. This he claimed was the position under our law. Something of the same idea appears to have been present to the mind of the trial Judge.

Forcibly as Counsel's argument was presented I am unable to uphold it. A vendor cannot represent title of which he has divested himself and there is not even a legal fiction to that effect. In the case where a purchaser, who has not been placed in possession, sues a trespasser in ejectment and calls upon the vendor to warrant and defend title, it is clear from the authorities that the vendor is called in to warrant and defend not his, but the vendee's title. The vendor does no more than assist in the proof of the title *conveyed* by him. There is no vestige of title *left* in him which he can on his own account or vicariously put forward or " represent ".

The other argument of Counsel for the first and second defendants-respondents, was that as the third defendant (Kumarihamy) was a party she was entitled to destroy the cases of the plaintiffs and for this purpose could point to the decision in case No. 143. She could undoubtedly do so for her own purposes and to the extent of the scope of the decision in that case. But this does not mean that the plea which she could raise on her own behalf is one that she could confer on the first and second defendants. With or without her consent, whether she was a party or not, they could raise the plea themselves in their own favour, but *only* if they are in law entitled to do so. One must inevitably come back to the question of privity and whether the respondents were privies. Undoubtedly they are not unless Counsel's first argument is sustainable and I have held otherwise.

The appeal is allowed. The first and second defendants will pay the plaintiffs' costs of appeal. Kumarihamy's proctor did not raise issues (8) and (9). The case will be remitted for the purpose of it being proceeded with and all costs of trial prior and subsequent to this order will be in the discretion of the trial Judge.

SOERTSZ J.—I agree.

Appeal allowed.