1977 *Present:* **Ismail, J., Sharvananda, J. and Ratwatte, J.**

SELESTINA FERNANDO, Appellant *and* CYRIL FERNANDO and ANOTHER Respondents.

S.C. 67/72 (F) – D. C. NEGOMBO 1289/L

Res judicata – Right or title accruing subsequent to institution of action – Applicability of principle of res judicata – Civil Procedure Code, Sections 33, 34 and 207.

Plaintiff instituted this action for a declaration that she is entitled to the land called Kahatagahawatta on a chain of title through which the plaintiff's predecessor in title viz. Luke Fernando bought same on deed No. 168 dated 26.06.47 from Dias Gunasekera. Luke Fernando thereafter, conveyed the land by Deed No. 2795 dated 26.12.63 to the Plaintiff.

The 1st and 2nd defendants filed answer pleading that this same land was the subject-matter in D.C. Negombo Case No. 15556 and that the decree entered in that case was *res judicata* as between them. In that case the plaintiff was Luke Fernando and the defendants were the present defendants. The plaint in that case was filed on 11.05.47 and the chain of title was different.

The District Judge upheld the plea of *res judicata.*

HELD, A plea based on facts which did not exist at the time of the former action but which came into existence subsequently cannot be said to be one which could have been raised in the former action. If a right accrues after the institution of a suit the plaintiff is not bound to put in issue that right the moment it accrues to him.

The doctrine of *res judicata* applies only to matters which existed at the time of the institution of the action.

Hence though Luke Fernando had, at the time of the judgment in D.C. Negombo No. 15556 dated 16th May 1951 been vested with the title set out in the plaint in the present action, the rule of *res judicata* did not bar him from reagitating the title to the land on the basis of the new acquisition.

The plea of *res judicata* cannot be upheld.

APPEAL from a judgment of the District Court of Negombo.

Nimal Senanayake with *Eric Rajapakse* for plaintiff-appellant.

J. W. Subasinghe with *Miss M. Kalatuwana* for 1st and 2nd defendant-respondents.

Cur. adv. vult.

February 9, 1977, SHARVANANDA, J.–

The plaintiff-appellant instituted this action for a declaration that she is entitled to the land called 'Kahatagahawatta' fully and particularly described in the schedule to the plaint. She alleged that the land is depicted as Lots 1 and 2 in Plan No. 1009 marked 'X'.

The 1st and 2nd defendants-respondents filed answer denying the plaintiff's claim and stated that the land described in the schedule to the plaint is identical with the land described in the schedule to the plaint in D.C. Negombo Case No. 15556 and that the decree entered in that case was *res judicata* as between the parties.

The case proceeded to trial on the following issues which were answered by the trial Judge as follows:–

1. Is the plaintiff entitled to the land described in the schedule to the plaint now depicted as Lots 1 and 2 in Plan No. 1009 filed of record marked 'X' on the chain of title set out in the plaint?

   Answer: No.

2. ——————

3. ——————

4. Is the land described in the schedule to the plaint identical with the land depicted in Plan No. 1009 dated 14.6.68 filed of record in this case?

   Answer: No.

5. Is the land described in the schedule to the plaint identical with the land described in Schedule II of the plaint in D.C. Negombo Case No. 15556?

   Answer: Yes.

6. If so, is the decree entered in that case *res judicata?*

   Answer: Yes.

The District Judge, accordingly, dismissed the plaintiff's action with costs.

The plaintiff in Case No. 15556 was one Luke Fernando, the predecessor-in-title of the plaintiff in this case. The 1st and 2nd defendants in this case were the defendants in that case. The plaint in that case was filed on 11.5.47 on the basis that one Moses Fernando was at one time entitled to the two pieces of land described in the schedule to that plaint and that on the said Moses Fernando dying intestate, his heirs, by deed No. 13 of 11.9.29, sold and conveyed the premises to one Andrew Fernando who by deed No. 1508 of 1.3.45 sold and conveyed the premises to Luke Fernando, the plaintiff. The defendants in that case admitted that the original owner was Moses Fernando, but stated that his title had devolved on them by deeds No. 7974 dated 12.7.48 and No. 2466 dated 5.4.41. After trial, decree was entered in that case dismissing the plaintiff's action with costs on the ground that the title of Moses Fernando had not devolved on him as claimed by him.

The main defence in that case was that deed No. 13 of 11.9.29, by which Moses Fernando's intestate heirs purported to sell and convey the premises in suit to Andrew Fernando, the vendor of Luke Fernando, was not the act and deed of the said heirs and was never acted upon by the parties and that neither Andrew Fernando nor the plaintiff ever had possession of those lands. The defendants claimed that the title of Moses Fernando had, on the deeds referred to in their answer, vested in them. By his judgment dated 16.5.51 the District Judge accepted the defence and dismissed the plaintiff's action.

The plaintiff in the present case asserts a chain of title different to that pleaded by the plaintiff in D.C. Negombo Case No. 15556. She pleads that one Justina Fernando and her husband Gabriel Silva, upon deed No. 9703 dated 4.3.18, the original owners of the land and premises described in the

present plaint and that they had mortgaged the said land by bond No. 7264 dated 30.6.30 and the said bond was put in suit in C.R. Colombo 5519. In terms of the hypothecary decree entered in that case, the land was put up for sale and purchased by Dias Gunasekera, the judgment-creditor, upon Fiscal's conveyance No. 199988 dated 28.2.47. Thereafter, Luke Fernando bought same on deed No. 168 dated 26.6.47 from Dias Gunasekera. Luke Fernando has thereafter conveyed the land by deed No. 2795 dated 26.12.63 to the present plaintiff.

While the defendants claim that the land described in the schedule to the plaint in this action is identical with the land described in the schedule II of the plaint in D.C. Negombo 15556, the plaintiff contends that the lands are two different, defined allotments of 'Kahatagahawatta.'

Even accepting the contention of the defendants about the identity of the land in dispute, one notes that the title pleaded in action No. 15556 is different to the title pleaded in this case. The title pleaded in the earlier case was that of Moses Fernando and his heirs, while the title pleaded in the present action is that of Justina Fernando and her husband Gabriel Silva and their heirs. At the time, viz. 11.5.47, when Luke Fernando instituted action No. 15556, he had not acquired the title pleaded by the plaintiff in this action. The title was acquired by him only on 26.6.47 after the institution of action No. 15556. The question then arises whether the present plaintiff, who is a privy of Luke Fernando is entitled to advance in this action her claim based on the new title, or whether the dismissal of the earlier suit operates to bar the maintenance of such claim.

Section 33 of the Civil Procedure Code provides, that "every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subject in dispute and so to prevent further litigation concerning them." In terms of this section, when a plaintiff brings an action for land, he must set out every title by which he claims to be entitled to it at the time of the action. If he omits to plead any title on which he might have relied in that action, he is debarred from setting up such title in a subsequent action. A second suit based on a different title which though existing at the date of the institution of the action, was not put in issue in the earlier action, cannot be brought. Section 33 is complementary to section 34(1) which provides: "Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action . . .'. This rule requires that every suit shall include the whole of the claim arising from one and the same cause of action, and not that every action shall include every claim on every cause of action which the plaintiff may have against the

defendant. The whole of the claim which the plaintiff is entitled to make in respect of the cause of action in this rule means the entire claim which the plaintiff has against the defendant at the time the action is brought in respect of that cause of action. Our law of *res judicata,* as laid down in section 207 of the Civil Procedure Code, further stipulates that "every right of property . . . which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a *res judicata,* which cannot afterwards, be made the subject of an action for the same cause of action between the same parties." Thus, section 207 makes a decree conclusive not only as to matters actually pleaded, put in issue and tried and decided, but also to matters and grounds which, according to the existing rules of procedure, should have been pleaded, tried and decided. For example, where a person has title to a piece of land from two sources X and Y if he puts in issue X only and is defeated, he cannot, afterwards in a subsequent action, sue the defendant on title Y; or, if he is sued in ejectment, he cannot set up title X only and when beaten he cannot thereafter assert title Y against his adversary. It is the plaintiff's duty to assert, in support of his claim, all grounds of attack that existed at the time of the institution of the action. Not only should the whole of the claim which had arisen, at the date of the action, but the cause of action be included in the suit so as to avoid the splitting up of claims arising out of one and the same cause of action, but every ground of attack and defence which could and ought to have been advanced in support or in defence of the claim should be put in issue and would be deemed to have been adjudicated upon, whether it was actually urged or not against the person who was entitled to raise it. But, where a party could not have raised a ground of attack or defence, this rule of constructive *res judicata* will not apply. A plea based on facts which did not exist at the time of the former action, but which came into existence subsequently, cannot be said to be one which could have been raised in the former action. thus 'A' brings an action against 'B' for declaration of his title as owner of Blackacre and the action is dismissed on the ground that 'A' is not the owner. At the time of the action, 'A' was in adverse possession of the land, but had not acquired title by prescriptive possession. After dismissal of the suit, if he perfects his title by adverse possession and subsequently sues 'B' again on the basis of his newly acquired prescriptive title, the action is not barred as the cause of action in the subsequent suit is based on facts not in existence at the time of the former action. A plaintiff who acquires a fresh right or title during the pendency of his action or thereafter can thus bring another action and is not bound to rely on the new right or title in the action that is pending then. The reason is that in such a case the litigation under a

title different to that of the former suit, which title was not available to him at the time of the institution of the earlier action. On that ground the subsequent action will not be barred by *res judicata.* If a right accrues after the institution of a suit, the plaintiff is not bound to put in issue that right the moment it accrues to him. An amendment of the plaint would be necessitated if he wants to do so, and the Court might or might not allow the application for amendment. As a general rule, such an application would have been rejected on the ground that the rights of parties must be determined as at the commencement of the action – *Silva v. Fernando.*[1] As Sansoni, J. stated in *Kandappa Chettiar v. Janakiammah*[2] "Where a plaintiff claims to be entitled, as trustee, to a land and seeks to eject a trespasser, he will not be entitled to rely on a vesting order unless he has obtained such vesting order prior to the filing of the action. If the legal estate was not in him at the commencement of the action, no vesting order obtained subsequently will cure the initial want of title." This passage was quoted with approval by the Court of Appeal in *Balasunderam v. Rama.*[3] A party claiming a declaration of title must have title in himself when he institutes the action. "In order to sue in a *rei vindicatio* action, the plaintiff must, at the time of the action, have the right of ownership actually vested in him. – *vide* Nathan on Common Law South Africa vol. I p. 393; s. 593. Subsequent acquisition, even though during the pendency of the action, will not cure the defect. In *De Silva v. Goonetileke*[4], it was held that "Where an action *rei vindicatio* had been instituted in respect of a property which had been vested, for non-payment of taxes, in the Municipal Council by virtue of a vesting certificate issued in terms of section 146 of the Municipal Councils Ordinance, the plaintiff could not maintain the action even though the Municipal Council, on being added as a party, expressed its willingness to transfer the property to the party declared entitled thereto by Court." Thus, in a *rei vindicatio* action, the plaintiff cannot invoke a right acquired by him during the pendency of an action. – see *Kaddubawa v. Shanmugam.*[5] In view of this rule, the new title averred by the plaintiff-appellant in the present action could not have been a ground of attack in the earlier action No. 15556 and hence no rule of *res judicata* could stand in the way of the plaintiff reagitating that question of ownership of the land on the basis of the new title.

Further, it is a fundamental requirement of the doctrine of *res judicata* that the matter in issue in the two suits should be the same. There can be no *eadem quaestio,* and therefore no estoppel by *res judicata,* unless everything in controversy in the proceedings where the question of estoppel is raised

[1] (1913) 15 N.L.R. 499 P.C.
[2] (1974) 76 N.L.R. 289.
[3] (1953) 54 N.L.R. 467.
[4] (1960) 62 N.L.R. 447 et 450..
[5] (1931) 32 N.L.R. 217 D.B.

was also in controversy in the litigation which resulted in the judicial decision relied upon as estoppel. The new title was not in controversy in the earlier proceedings in D.C. Negombo No. 15556 and was not adjudicated upon. Since there was no adjudication, the doctrine of *res judicata,* in the strict sense of the term, does not apply. Also, no rule of constructive *res judicata* applies as the newly acquired title could not have been put forward in the earlier suit. As explained earlier, this rule requires a man, suing for land, to put forward only the title of which he was possessed at the time when the suit was brought, but not title acquired subsequently. The new title did not belong to the subject of the earlier litigation. Since the issue in the instant proceedings is not *eadem quaestio* as that decided in the earlier action covering the dispute, there is no judgment or determination by a competent Court giving rise to any estoppel by *res judicata.*

In the case of *Kalu Banda v. David Appuhamy,*[6] it was held that a decree entered in favour of the plaintiff in an action for a declaration of title to a divided portion of land consisting of certain lots cannot operate as *res judicata* in another similar action between the same parties in respect of the same land but in respect of a different lot, the title to which was acquired by the defendant from a third party **subsequent to the decree** in the earlier action. The principle underlying that decision is that where though the action may relate to the same subject-matter but the cause for claiming is not the same, the bar of *res judicata* does not operate. – see also *Vivekasirenmany v. Ramasamy.*[7] This principle applies even where the plaintiff acquired the new title prior to the decree in the earlier action, but subsequent to the institution of that action. In the case of *De Silva v. Wijeratne*[8], it was held that "although a purchaser of property at a Fiscal's sale is not competent before he obtains the Fiscal's conveyance, to make a claim under section 243 of the Civil Procedure Code, the order disallowing his claim, if he makes any, is only *res judicata* with regard to his interest at the date of seizure and is no bar to any assertion of title by him or his successor-in-title under the Fiscal's transfer." In the case of *Cooray c. Jayewardene,*[9] it was held that "failure of the plaintiff to include a claim upon a cause of action which arose after the institution of an action, although upon the same subject-matter, is no bar to the institution of a subsequent action upon such claim." The cause of action upon which the present action was founded was not in existence at the time of the institution of the first action and could not have been the subject of litigation in that action. I do not think that an issue as to damages, consequent on an ouster which took place after the institution of the first action, could have been entertained by the Court in that action. The Court could only have decided the rights of the parties as at the date of the action." – per Jayatileke, J. at p. 428.

[6] (1965) 56 N.L.R. 162.
[7] (1966) 69 N.L.R. 436.
[8] (1945) 46 N.L.R. 560..
[9] (1943) 43 N.L.R. 427.

In the case of *Newington v. Levy,*[10] Blackburn J. said: "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 the opportunity of bringing before the Court." Under our rules of procedure, this observation can apply in its totality only to a defendant in a *rei vindicatio* action, but not to a plaintiff in such an action. As was held in *Banda v. Karohamy,*[11] "A defendant is bound to set up by way of defence every ground available to him not merely at the date of the institution of the action, but accruing to him thereafter and prior to judgment." For, in an action *rei vindicatio*, where the plaintiff loses title to the land subsequent to the institution of the action, it is open to the defendant to establish the fact of such loss of this title on the part of the plaintiff and to have the action for declaration of title and ejectment dismissed. – *Elishamy v. Punchi Banda.*[12] But, where the plaintiff in an action *rei vindicatio* acquires title to a land subsequent to the institution of the action, but before judgment, he will not be entitled to plead the benefit of such acquisition in that action as he cannot succeed on the strength of a title acquired after the commencement of the action. Thus, in the case of a plaintiff in a *rei vindicatio* action, the doctrine of *res judicata* applies only to matters which existed at the time of the institution of that action. Hence, though Luke Fernando had, at the time of the judgment of D.C. Negombo No. 15556, viz. 16th May 1951, been vested with the title set out in the plaint in the present action, the rule of *res judicata* did not bar him from reagitating the title to the land on the basis of the new acquisition. The plaintiff, who is his privy, is also thus not estopped from litigating.

For the reasons set out above, the District Judge's answer to the issue of *res judicata* cannot be sustained. He has dismissed this action mainly on the ground that the plaintiff is bound by the plea of *res judicata,* and had not *examined the other questions about the identity of the land and the validity of the plaintiff's title as pleaded by her. The issue of res judicata* has to be answered in the negative. I set aside the judgment of the Lower Court and remit the case for a trial *de novo.* It may be because of the view held by the defendants about the soundness of their plea of *res judicata* that they did not raise the issue of prescription. It will be open to the parties to amend their pleadings or to raise other issues, except the issue of *res judicata,* involved in the action. The costs of the abortive trial and of this appeal will be costs in the case.

ISMAIL, J. – I agree.

RATWATTE, J. – I agree.

Judgment set aside and case sent back for trial de novo.

[10] 6 L.R.C.P. 180 at 193.
[11] (1949) 50 N.L.R. 369.
[12] (1912) 14 N.L.R. 113.