Dabare v. Appuhamy

COURT OF APPEAL.
ABDUL CADER, J. AND L. H. DE ALWIS, J.
C. A. (L. A.) 12/80—D. C. COLOMBO 292/RE.
AUGUST 4, 1980.

Res judicata—Plea taken by defendant—Whether adjudication on the merits necessary—Procedure followed in first action contrary to that laid down by law—No objection taken by plaintiff—Whether such defect in procedure affects validity of judgment in earlier action.

The plaintiff-respondent filed an action in the Magistrate's Court, Colombo against the appellant for the latter's ejectment from certain premises. This action was dismissed as the plaintiff-respondent and his attorney-at-law were absent on the date fixed for preliminary inquiry. The respondent made an application to have this order of dismissal set aside but after hearing parties the learned Magistrate refused the application. The plaintiff-respondent then filed a second action in the District Court and the plea was taken that the judgment in the first case operated as a bar to the institution of the second action in the District Court. This was tried as a preliminary issue and it was also submitted on behalf of the respondent that the learned Magistrate had in the first action followed the wrong procedure and that he did not have jurisdiction to adopt the procedure that he did. The learned District Judge held that dismissal of the earlier action did not operate as *res judicata* since there was no adjudication on the merits in that action.

Held

The dismissal of the action filed by the plaintiff-respondent in the Magistrate's Court operated as *res judicata* and accordingly the second action filed by the plaintiff-respondent should be dismissed. Even though the Magistrate had followed the wrong procedure the order of dismissal made by him was valid since he had jurisdiction to hear and determine the action and further the plaintiff-respondent himself did not take objection to the wrong procedure being followed.

Cases referred to

(1) *Herath v. The Attorney General, (1958) 60 N.L.R. 183.*
(2) *Dharmadasa v. Piyadasa Perera. (1961) 64 N.L.R. 249.*
(3) *Annamalay Chetty v. Thornhill, (1932) 34 N.L.R. 381.*

APPEAL from the District Court, Colombo.

E. M. B. Ekanayake, for the appellant.
M. S. M. Nazeem, with *M. Farouk Thahir,* for the respondent.

Cur. adv. vult.

September 17, 1980.

ABDUL CADER, J.

On 3rd October, 1974, the respondent to this appeal filed action to eject the appellant from the premises described in schedule C and for damages under No. 182/L in the Magistrate's Court of Colombo. The Magistrate fixed it for preliminary inquiry on 15.2.77 and the plaintiff and his Attorney-at-law being absent, he dismissed the action. On 11.3.77, the respondent filed papers to have the dismissal set aside (D1A) and after hearing both parties who were represented by Counsel on 28.3.77, the Magistrate refused to set aside the order dismissing the action. Thereafter, the plaintiff filed this action No. 292/RE in the District Court of Colombo and among the issue raised at the trial, two issues were tried preliminarily.

> " (6) In any event, does the judgment in Case No. 182/L of the Magistrate's Court operate as a bar to the institution of this action ?
>
> (7) If so, can the plaintiff have and maintain this action ? "

The learned Additional District Judge, following a reported decision (1) held that there has been no adjudication on merits in case No. 182/L and, therefore, the dismissal of the plaintiff's action in No. 182/L does not operate as res judicata. It is against this order that the defendant in that action has appealed.

Counsel for the appellant drew our attention to the case of *Dharmadasa v. Piyadasa Perera* (2) wherein Gunasekera, J. disagreed with the view expressed by Basnayake, C.J. in the case reported in (1) and submitted that the learned District Judge had come to a wrong decision in holding that the principle of res judicata would not operate.

Counsel for the plaintiff-respondent stated there are certain circumstances in this case which made the case (1) applicable to the facts of this case as the Magistrate did not have jurisdiction to follows the procedure that he adopted leading to the dismissal of the plaintiff's action. He submitted that this was an action filed in the Magistrate's Court under the provisions of the

Administration of Justice Law, No. 25 of 1975. Section 363 (2) requires the Magistrate to proceed by way of summary procedure. Trial by way of summary procedure is outlined from sections 564 to 571 of the said Law. Section 565 requires the Magistrate to enter either order nisi or interlocutory decree and serve a copy on the respondent to the action. This, the Magistrate failed to do, but instead followed the provisions of regular procedure by fixing the matter for preliminary inquiry and it was at this stage of the preliminary inquiry that the Magistrate dismissed the action, when the plaintiff-respondent was absent. Counsel urged that since the Magistrate adopted a procedure which he was not empowered to adopt, the Magistrate had no jurisdiction to dismiss the plaintiff's action.

In the first place, it is the plaintiff in an action who should be wary about the procedure adopted by Court to conduct the trial. After all, it is his grievance that the Court is investigating and it is his business to assist the Court to see that the proper procedure is being followed. The journal entry containing the date on which the matter was fixed for preliminary inquiry has not been produced. If it is the contention of the plaintiff-respondent that he was not to blame, it was his burden to produce that journal entry. I would, therefore, be entitled to assume that when the Court fixed the matter for preliminary inquiry, at the least it is the plaintiff-respondent who virtually permitted the Court to adopt a wrong procedure and, consequently, is to be blamed.

Secondly, at the first opportunity that the plaintiff had to protest agains the wrong procedure after the order of dismissal was made, he acquiesced in the procedure followed by Court and filed papers to have the order of dismissal set aside on the ground of ill-health. He did not contend that the Court had adopted the wrong procedure. After the Court made order refusing to set aside the order of dismissal, the plaintiff-respondent did not seek relief from a superior Court to set aside that order, but instead filed this case No. 292/RE.

Thirdly, in the case of *Annamaly Chetty v. Thornhill* (3) Garvin, S.P.J. stated as follows :—

> " The ordinary jurisdiction of the District Court of Ratnapura in which the action No. 4,122 was instituted extended to the parties as well as to the subject matter of the action. The plaintiff averred that that Court had jurisdiction to give him the relief claimed upon the cause of action pleaded. If then the matter was within the general jurisdiction of the Court can it be urged that that jurisdiction was

ousted by the provisions of section 9 of the Business Names Ordinance, No. 6 of 1918, which rendered the claim unenforceable by action ? It is in the nature of a condition imposed upon a person carrying on business under a business name with which he must comply before he can enforce by action a claim upon a contract made in connection with his business. The provision is one which Bertram, C.J. thought a Court of law should enforce ex mero motu when it came to its notice that the plaintiff had failed to comply with it. Had a Court in ignorance of any such infringement proceeded after trial or without objection to determine the claim on its merits it could not be successfully urged that its decree was not the decree of a Court of competent jurisdiction and did not therefore operate as *res adjudicata*. The requirement of registration of a business name operates as a condition upon which the exercise of a Court's jurisdiction may be invoked ; possibly as a condition of the exercise of its jurisdiction. 'But the competency of a Court's jurisdiction over a suit is not affected.....by the conditions or mode of its exercise .....' Hukm Chand on Res Judicata, section 181, p. 449."

In case No. 182/L, the Court had jurisdiction to entertain the plaint, to hear the parties and to dismiss the action. I am of the opinion that the adoption of wrong procedure would not affect the jurisdiction of the Magistrate. He had jurisdiction to dismiss the action for want of appearance and that, I believe, is the crux of the matter. As Garvin, S.P.J. stated, "Had a Court in ignorance of any such infringement proceded after trial or without objection to determine the claim on its merits, it could not be successfully urged that its decree was not the decree of a Court of competent jurisdiction and did not therefore operate as *res adjudicata.*"

I am in respectful agreement with the view expressed therein. No authorities have been cited either by way of decisions or from text book writers that the failure to follow the procedure would defeat the jurisdiction of the Court. On the other hand, *Hukm Chand* says at page 449 in the *Law of Res Judicata* :—

> "The competency of a court's jurisdiction over a suit is not affected, however, by the conditions or mode of its exercise, by the legal character or position of the suit, or the procedure prescribed for its cognizance or disposal,"

I have, therefore, come to the conclusion that the order made by the Magistrate dismissing the plaintiff's action in case No. 132/L was a valid order and, therefore, would operate as res adjudicata.

For all these reasons, I have come to the conclusion that the order of the Additional District Judge should be set aside and issues 6 and 7 should be answered as follows :—

(6) Yes.

(7) No.

Therefore, action No. 292/RE is dismissed with costs in both Courts.

L. H. DE ALWIS, J.—I agree.

Appeal allowed.

K. Thevarajah,
Attorney-at-law.