Present: The Hon. Mr. J. P. Middleton, Acting Chief Justice, and Mr. Justice Wood Renton.

Jan. 24, 1910

DINGIRI MENIKA *v.* PUNCHI MAHATMAYA *et al.*

D. C., Kegalla, 2,437.

Res judicata—*Dismissal of action in Court of Requests for a small portion of an inheritance—Subsequent action in District Court for the remainder—Decisory oath—Civil Procedure Code, ss. 34, 207, and 406—Cause of action—Interlocutory appeals.*

Plaintiff's claim, in C. R., Kegalla, 7,627, to one land by right of paternal inheritance was dismissed on the strength of a decisory oath. In the present case the plaintiff claimed by the same right in the District Court as against the same defendants other lands belonging to the same inheritance.

Held, the decision in the first case was *res judicata* of the present action.

For the purpose of determining whether or not two causes of action are the same, we have to look not to the mere form in which the action is brought, but to the grounds of the plaint, and to the *media* on which the plaintiff asks for judgment.

Sections 34, 207, and 406 of the Civil Procedure Code are not exhaustive of the law of *res judicata* in the Colony.

APPEAL from a judgment of the District Judge of Kegalla (E. B. Sueter, Esq.).

In C. R., Kegalla, 7,627, to which the present defendants were parties, the plaintiff claimed one land by right of paternal inheritance; the defendants alleged that plaintiff was married in *diga*, and had thereby forfeited her right to inherit any portion of the inheritance. The action was dismissed on the strength of a decisory oath. The plaintiff instituted the present action in the District Court to vindicate other lands belonging to the same inheritance. The District Judge held that the decision in C. R., Kegalla, 7,627, barred the plaintiff from claiming any portion of her father's estate by inheritance. The plaintiff appealed before the issue as to prescription was decided.

E. W. Jayewardene, for the plaintiff, appellant.—Under section 13 of the old Indian Civil Procedure Code an issue once tried cannot be tried again; but under section 207 of our Code it is the same cause of action that cannot be tried a second time. The doctrine of *res judicata* in Ceylon applies to the decree, and not to the decision on every issue raised in the case. Counsel cited *Bastian Silva v. Marian Silva*,[1] *Bastian Appu v. Goonawardana*.[2]

[1] *(1909) 12 N. L. R. 181.*

[2] *(1906) 10 N. L. R. 167.*

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A. St. V. Jayewardene, for the defendants, respondents.—The sections of the Civil Procedure Code do not exhaust the law as to *res judicata*. Counsel cited *Krishna Behari Roy v. Lall Roy*,[1] *Chand Kour v. Partab Singh*,[2] *Outram v. Morewood*,[3] *Endris v. Adrian Appu*,[4] *Ramasamy Ayar v. Vythianath Ayar*.[5]

E. W. Jayewardene, in reply.

Cur. adv. vult.

January 24, 1910. MIDDLETON A.C.J.—

This was an appeal taken in interlocutory form before all the questions in the action had been decided by the District Court, which, in my opinion, ought not to have been heard until the case had been finally disposed by the District Court.

A decision on the point before us will not finally dispose of the matters in dispute between the parties, and there will of necessity be a further trial, and such an appeal as this delays the hearing of the action and puts the respondent to the expense of meeting two appeals where one would suffice.

I was strongly inclined to send the case back without deciding the point before us, but our action in hearing and giving judgment on the point before us as it stands must not be taken as a precedent.

The only point now raised is whether a decision in C. R., Kegalla, No. 7,627, between the same parties in an action to recover a land forming part of the same inheritance in dispute here, holding that the plaintiff is not entitled to inherit from her father's estate on the ground that she was married in *diga*, is *res adjudicata* in the present action, which is to vindicate the greater part of the same inheritance.

In the petition of appeal the point was taken that the former decision having been given upon decisory oath could not be taken to be *res judicata* of the present case. That point was, however, abandoned in appeal, and the only point practically insisted upon was that the cause of action in the Court of Requests case was not the same as in the present case, and *12 N. L. R. 181* with certain Indian cases was relied on.

Some attempt was made to put forward the point that the subject-matter of the first action was beyond the jurisdiction of the Court of Requests, but I do not think the appellant ought to be allowed to support this proposition, in view of the fact that she was the plaintiff in the Court of Requests case, and chose her *forum* on the ground that the Court of Requests had jurisdiction.

[1] *(1875) I. L. R. 1 Cal. 144.*
[2] *(1898) 16 Cal. 98.*
[3] *(1803) 3 East's Reports 346.*
[4] *(1905) 11 N. L. R. 62.*
[5] *(1903) 26 Mad. 760.*

Now, in my opinion, the cause of action here and in the Court of Requests was the denial of the plaintiff's right to inherit a share of her father's estate, in fact and effect the same in both actions. That point was decided on the issue whether there was a *diga* marriage raised in C. R., Kegalla, No. 7,627. *Flitters v. Allfrey*[1] shows that the English Law, which I think we must follow, as that observed by this Court up to the present (see *12 N. L. R. 186*) on this point, deems the decision of a County Court to be *res judicata* in the High Court. *Outram v. Morewood*[2] seems to me also in point against the appellant though cited by him. *Endiris v. Adrian Appu*[3] holds that a decision as to title to a portion of land is *res judicata* as to the rest of the land.

I think therefore that, unless the Indian doctrine as laid down in section 13 of the Indian Civil Procedure Code that the former Court must have had jurisdiction to try the subsequent suit in which the plea is raised prevails, we are bound to hold in this case that the decision in C. R., Kegalla, No. 7,627, is *res adjudicata* of the present action. In other words, I would hold it is not necessary in Ceylon, in order to constitute a valid estoppel by *res adjudicata*, that the Court giving the former decision should have had concurrent jurisdiction with the Court called upon to deliver the latter. I do so with considerable reluctance, as I have a strong opinion that the decision of the question of the *diga* marriage in the Court of Requests case was not good according to Kandyan Law. This decision was, however, never appealed against, and stands good and binding as between the parties to it (*Gavin v. Hadden*[4]).

This leads me to the conclusion that in Ceylon, where the inferior Courts are not always presided over by competent lawyers, as in the case of the County Courts in England, there should be some provision as regards concurrent jurisdiction on the question of *res judicata* as in section 13 of the Indian Code. This was the ground of the decision in *Edun v. Bechun*,[5] which is said to be still the leading case on this point in India, and has been consistently followed by the Privy Council.

I would support the judgment, and dismiss the appeal with costs.

WOOD RENTON J.—

In this case the appellant sues the respondents for a declaration of title to one-twelfth share of twenty lands, which she claims by right of paternal inheritance and also by prescription. The respondents pleaded (1) that the appellant was married in *diga*, and thereby forfeited her share in her father's estate; (2) that an issue

[1] *(1874) L. R. 10 C. P. 29.*
[2] *(1803) 3 East's Reports 346.*
[3] *(1905) 11 N. L. R. 62.*
[4] *(1871) 8 Moore P. C. (N. S.) 90.*
[5] *(1867) 8 W. R. 175.*

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as to the appellant's *diga* marriage was raised between the same parties in C. R., Kegalla, No. 7,627, and decided against the appellant; (3) that the appellant's present claim is, therefore, barred by the doctrine of *res judicata;* (4) that they themselves have acquired a prescriptive title to the share in suit. Issues were raised, when the case came on for hearing, involving pleas of *res judicata* and prescriptive title. The learned District Judge held that the question of the apellant's *diga* marriage was *res judicata*. He did not go, meanwhile, into the question of prescriptive title. Against this decision the present appeal has been brought. Although the point which formed the mainstay of the appellant's argument before us, namely, that there is no room for a plea of *res judicata* in the present case, inasmuch as the cause of action on which it is based is not the same as the cause of action in C. R., Kegalla, No. 7,627, was touched upon in the argument in the District Court, and may perhaps be taken to be alluded to in the first part of paragraph 6 of the petition of appeal, the main ground on which the applicability of the plea of *res judicata* was denied, both in the District Court and in the petition of appeal, was that the decision in C. R., Kegalla, No. 7,627, had been pronounced on the strength of a decisory oath taken by the respondents who were added defendants in that case, and one of their witnesses. The appellant's counsel did not press this point upon us at the hearing of the appeal, and in my opinion, it is clearly bad. I see no reason why a judgment found on a decisory oath, which has been regularly administered and taken, should not operate as *res judicata*. Moreover, it appears from the record of the proceedings in C. R. Kegalla, No. 7,627, that the decisory oath, to which I have just referred, related only to the question as to whether the plaintiff in that action, who is the present appellant, had taken a share of the produce of the field there in dispute. The Commissioner of Requests had before him independent evidence showing that the plaintiff had been married out in *diga*. The plaintiff called no evidence in rebuttal. Under these circumstances, the Commissioner of Requests was entitled to hold, as he did hold, on the evidence before him, that the *diga* marriage had been established.

Before dealing with the main problem that has to be solved in the present case, I should perhaps note in passing another objection which, although not taken, so far as I can see, either in the District Court or in the petition of appeal, was urged upon us by the appellant's counsel. He pointed out that at the hearing of the case C. R., Kegalla, No. 7,627, the present respondents had suggested an issue as to the value of the appellant's share of the land in dispute, with a view to showing that the case fell beyond the jurisdiction of the Court of Requests, and that the Commissioner had refused to accept this issue on the ground that it had not been raised in the pleadings. The present appellant, however, in her

plaint in C. R., Kegalla, No. 7,627, had valued the share claimed in the land in question at Rs. 100. I do not think that she ought now to be allowed to go back on that valuation.

I proceed to consider the argument that a plea of *res judicata* cannot be supported in the present case, on the ground that its subject-matter is different from that which was in litigation in C. R., Kegalla, No. 7,627. The parties to the two cases are the same. The present appellant is plaintiff in both, and the present defendants, respondents, are added defendants in C. R., Kegalla, No. 7,627. The Court of Requests, assuming that the share in dispute was properly valued at Rs. 100, had undoubted jurisdiction to try the case. The fact that it would not have had jurisdiction to try an action brought for declaration of title to the lands now in suit is irrelevant, so long as it was competent to adjudicate upon the issue actually submitted to it. The weight of English authority supports the view that, when a question of title has to be, and is, decided by a Court of competent jurisdiction with reference to the subject-matter in dispute, such decision or the ultimate decision on appeal from it is final, and the question of title becomes a *res judicata* as between the parties to the suit, although it may have the effect of determining the title to an estate or estates the value of which exceeds the jurisdiction of the Court in which the suit was instituted (see *Flitters v. Allfrey*[1] and *Priestman v. Thomas*[2]).

The Indian authorities, in which a contrary view has been taken of the meaning of the words " Court of competent jurisdiction " in section 13 of the old Code of Civil Procedure (see *Misir Raghobardial v. Sheo Baksh Singh*[3] and *Run Bahadur Singh v. Lucho Koer*[4]). seem to me to turn on the provisions of that section, and to have no application in Ceylon, where no corresponding enactment exists. It results both from English and from Indian authorities (see *Outram v. Morewood*,[5] *Krishna Behari Roy v. Bunwari Lall Roy*,[6] and *Chand Kour v. Partab Singh*[7]) that for the purpose of determining whether or not two causes of action are the same, we have to look not to the mere form in which the action is brought, but to the grounds of the plaint, and to the media on which the plaintiff asks for judgment. I do not think that, even if sections 34, 207, and 406 of the Civil Procedure Code were exhaustive of the law of *res judicata* of Ceylon, there is anything in them necessarily to exclude the application of the principle laid down in the English and Indian decisions just referred to, and see *Endris v. Adrian Appu*,[8] C. R., Kegalla, No. 3,657,[9] per Lawrie J.; C. R. Kandy, 3,044.[10] But apart from

[1] *(1874) L. R. 10 C. P. 29.*
[2] *(1884) 9 P. D. 70, 210.*
[3] *(1882) I. L. R. 9 Cal. 439.*
[4] *(1884) I. L. R. 11 Cal. 301.*
[5] *(1803) 3 East's Reports 346, 352.*
[6] *(1875) I. L. R. 1 Cal. 144.*
[7] *(1888) I. L. R. 16 Cal. 102.*
[8] *(1905) 11 N. L. R. 62, 63 ; S. C. 172.*
[9] *(S. C. Min., Dec. 13, 1900.*
[10] *S. C. Min., March 12, 1906,*

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that, I do not think that the sections in question should be held to be exhaustive of the law of *res judicata* in this Colony (see *Mohamed Cassim v. Sinne Lebbe Maricar*[1]). In C. R., Kegalla, No. 7,627, the appellant claimed one land by paternal inheritance. In the present case the lands claimed are different, but they belong to the same inheritance, and are claimed by the appellant in the same right. The right in which both claims are put forward has already formed the subject of adjudication in C. R., Kegalla, No. 7,627, and, in my opinion it cannot again be asserted in the present action. There is nothing in the definition of "cause of action" in the Civil Procedure Code which can exclude the application in such cases as the present of the salutary maxim *nemo debet bis vexari pro una et eadem causa*.

I would dismiss the appeal with costs. The case will go back for the trial of the issue of prescriptive title. I desire to add that I do not see any reason why in this case an appeal should have been taken on the issue as to the *diga* marriage alone. The appellant should have completed her case, and then, if so advised, appealed against the final judgment, in whole or in part, according as it was or was not adverse to her.

Appeal dismissed.

[1] *(1909) 12 N. L. R. 184.*