Present: Ennis J.

1917.

PEDRUPILLA *v.* *DIONISA.*

247—C. R. Jaffna, 11,891.

Action under s. 247, Civil Procedure Code—Writ-holder bound by judgment against debtor in action between debtor and claimant.

Obiter.—In an action under section 247 of the Civil Procedure Code, between the unsuccessful judgment-creditor and the successful claimant, the judgment-creditor is concluded by a judgment adverse to the judgment-debtor in a litigation between the debtor and the claimant.

Kuda Banda v. Dingiri Amma [2] doubted.

THE facts are set out in the judgment.

A. St. V. Jayawardene (with him *Arulanandan*), for appellant.—The learned Commissioner has found that the land belonged to the second and third defendants, and not to the first defendant-respondent. That being so, he should have declared the land liable to seizure in execution of our decree against the second and third defendants. It is not open to the first defendant-respondent to say in these proceedings that the decree in the District Court case No. 11,043, in execution of which the land was seized, was obtained by fraud and collusion between the plaintiff-appellant and the second and third defendants-respondents.

[Ennis J.—But this case has been the subject of litigation between the first defendant on the one side and the second and third defendants on the other, and the first defendant has been successful. Is not the judgment-creditor concluded by that judgment against the judgment-debtors ?]

No. See *Kuda Banda v. Dingiri Amma.*[2]

[1] *Ram. (1843–1855) 132.* [2] *(1911) 14 N. L. R. 145.*

1917.

Pedrupilla v. Dionisa

[Ennis J.—In that case the distinction between an estoppel brought about by an adverse judgment was not drawn.]

Counsel cited *Richards v. Jenkins*,[1] *Richards v. Johnstone*,[2] *Shivapa v. Don Nagaya*,[3] *Perera v. Perera*.[4]

J. Joseph, for respondent.—The decree D. C. 11,043 was obtained by fraud and collusion between the appellant and the second and third defendants-respondents, and the appellant cannot avail himself of that decree against us.

[Ennis J.—Is it open to you to prove in this case that the decree in D. C. 11,043 is fraudulent and collusive ?]

Yes. See *Don Cornelis v. Don Carolis*.[5] There is ample evidence to support the finding of the Judge on this point.

A. St. V. Jayawardene, in reply.

Cur. adv. vult.

November 6, 1917. Ennis J.—

This was an action under section 247 of the Civil Procedure Code by the decree-holder in case No. 11,043, D. C. Jaffna, who, in execution of the decree, had seized the land in dispute, which was subsequently successfully claimed by the first respondent. The second and third respondents are the judgment-debtors in case No. 11,043. The learned Judge has found for the appellant as regards the title to the land, which he holds belonged to the judgment-debtor, but he has further found that the decree in No. 11,043 was obtained by fraud and collusion, to deprive the first defendant of the benefit of a judgment in his favour in D. C. Jaffna, No. 10,109 ; and the plaintiff's action was dismissed, with costs.

It appears that there have been a series of actions between the first respondent and the second and third respondents respecting title to the land in dispute, beginning in 1909 with D. C. Jaffna, No. 6,532, followed by C. R. Jaffna, No. 9,507, and D. C. Jaffna, No. 10,109, the last of which was decided in appeal on October 4, 1915. In these actions the first defendant was successful.

It was urged on the authority of *Kuda Banda v. Dingiri Amma*[6] that a judgment-creditor is not concluded by an adverse judgment against his debtor, and that it is open to him to show that the property belongs to his debtor. I am doubtful as to the soundness of this contention. In the case of *Dinendromath v. Ramkumar*[7] the Privy Council judgment said : " There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. Under the former a person derives title through the vendor,

[1] *8 Q. B. D. 451.*
[2] *4 M. & N. 660.*
[3] *11 Bom. 114.*
[4] *14 N. L. R. 270.*
[5] *6 Leader 95.*
[6] *(1911) 14 N. L. R. 145.*
[7] *L. R. 1 A. 65.*

and acquires a better title than that of the vendor. Under the latter the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations and encumbrances effected by him subsequent to the attachment of the property sold in execution. "

The cases of *Richards v. Jenkins*[1] and *Richards v. Johnstone*[2] were both cases in which property of goods was in question, and in both the point for determination was whether the claimant had any interest in the goods. As there had been no valid transfer of the goods, it was held that they did not vest in the claimant. It further appeared that there was at most nothing but an estoppel between him and the execution-debtor, and it was held that an estoppel of the kind existing in those cases did not bind the execution-creditor. In *Shiv'apa' v. Dod Nagaya*,[3] an action lost by the judgment-creditor to which his debtor was not a party, was not *res judicata* as against the judgment-debtor, as the creditor did not represent the debtor. These cases are not, therefore, directly in point in support of the proposition.

Hukm Chand (*Res Judicata* 5) draws the following distinction between *res judicata* and estoppel : " The essential features of estoppels are those which have found formulation in section 115 of the Evidence Act, the provisions of which proceed upon the doctrines of equity, that he who by his declaration, act, or omission has induced another to alter his position shall not be allowed to turn round and take advantage of such alteration of that other's position. All the other rules to be found in chapter VIII. of the Evidence Act, relating to estoppel of tenant, or of acceptors of bills of exchange, bailees, or licensees, proceed upon the same fundamental principles. On the other hand, the rule of *res judicata* does not owe its origin to any such principle, but is founded upon the maxim *nemo debet bis vexari pro una et eadem causa*—a maxim which is itself an outcome of the wider maxim: *interest republicæ ut sit finis litium*. The principle of estoppel, as I have already said, depends upon different grounds, and I think the framers of the Indian Codes of Procedure acted upon correct juristic classification in dealing with the subject of *res judicata* as appertaining to the province of procedure properly so called. Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel is to say that, whilst the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party, who, relying upon those declarations or acts, altered his position. In other words, *res*

[1] *18 Q. B. D. 451.*
[2] *4 M. & N. 660.*
[3] *11 Bom 114.*

1917.

ENNIS J.

Pedrupilla v. Dionisa

judicata prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence. Further, the theory of *res judicata* is to presume by a conclusive presumption that the former adjudication declared the truth, whilst an estoppel, to use the words of Lord Coke, is where a man is concluded by his own act or acceptance to say the truth, which means he is not allowed in contradiction of his former self to prove what he now chooses to call the truth. Thus, the plea of *res judicata* proceeds upon grounds of public policy so called, whilst an estoppel is simply the application of equitable principles between man and man, two individual parties to a litigation. "

It appears that estoppels may arise by the voluntary conduct of a party or by operation of law, and it seems to me that the principle that a judgement-creditor is not concluded by estoppels against his debtor applies only to estoppels which arise from conduct, and does not apply to an estoppel not brought about by the voluntary conduct of the debtor, but by an adverse judgment against him. A somewhat similar distinction was drawn in the case of *Perera v. Perera*[1] between " voluntary " and " necessary " alienations of property by a debtor during the pendency of a partition suit.

Had it been necessary to decide the present appeal on this point I should have referred the case to a fuller Court, but in the present case the learned Judge has found that the action which led to the execution proceedings was instituted fraudulently and collusively. This is a question of fact, with the finding of which I see no reason to interfere, as there is evidence upon which the finding could be based, and the case of *Don Cornelis v. Don Carolis*[2] is authority for the proposition that it is open in a 247 action to impeach the decree upon which the execution proceedings are founded.

I dismiss the appeal, with costs.

Appeal dismissed.

[1] *14 N. L. R. 217.*

[2] *6 Leader L. R. 95.*