

1943.

*Present : Hearne and de Kretser JJ.*

NAGARATNAM, Appellant, and THASSIM, Respondent.

24—D. C. Galle, 38,750.

*Res judicata—Action withdrawn without permission—Fresh action instituted—  
Civil Procedure Code, s. 406 (1).*

In case No. 38,041 instituted by plaintiff on a mortgage bond the defendant was made a party for the reason that he was a puisne encumbrancer.

In fact he was the purchaser from the mortgagor on a deed, which was registered subsequent to the plaintiff's mortgage and he had failed to register his address as required by section 6 (2) of the Mortgage Ordinance.

Before trial the plaintiff's proctor informed the Court that he was not a puisne encumbrancer and moved that he be dismissed from the suit, which was done.

In the present action plaintiff asked for a declaration that the rights acquired by the defendant were subject to the mortgage decree entered in case No. 38,041.

Held, that the plaintiff was barred by the decree in the mortgage action from maintaining the present action.

<sup>1</sup> (1900) 1 Q. B. 122.

**A** PPEAL from a judgment of the District Judge of Galle.

*H. V. Perera, K.C.* (with him *E. B. Wikremanayake* and *H. Wanigatunga*), for plaintiff, appellant.

*L. A. Rajapakse* (with him *D. Abeywickrema*), for defendant, respondent.  
*Cur. adv. vult.*

February 1, 1943. HEARNE J.—

The appellant was the plaintiff in case No. 38,041 of the District Court of Galle, in which he obtained mortgage decree on bond P 1 put in suit. In that case the respondent to this appeal was the fifth defendant. He had been made a party for the reason that, according to the plaint, he was a "puiſne encumbrancer". In point of fact he was not. He was the purchaser from the mortgagor on a deed which was registered subsequent to the mortgage in favour of the appellant. No address had been registered by him (*vide* section 6 (2) of The Mortgage Ordinance). Before the hearing of the case the appellant's proctor informed the Court that the respondent was not a puiſne encumbrancer and moved that he be dismissed from the suit. No permission to file a separate suit was applied for or obtained (section 406 (1) of the Civil Procedure Code). The application was allowed, "he was dismissed from the suit with costs", and at the conclusion of the *ex-parte* hearing the position of the respondent was underlined by a further order that "the fifth defendant is not bound by these proceedings". The terms of this order were reflected in the formal decree that was passed. At a later stage the appellant's proctor applied to have the order dismissing the respondent from the suit set aside. By an order (D 3), dated April 30, 1941, the Judge declined to set aside his order on the ground that he had no jurisdiction to do so. The appellant then filed case No. 38,750 asking for a declaration that the rights acquired by the respondent were subject to the mortgage decree entered in case No. 38,041, and it was held that the decree in the latter debarrred him from maintaining the former. It is from that order that he now appeals.

"We are not concerned with what the position would have been if the fifth defendant (respondent) had not been made a party at all in case No. 38,041". With that view of the learned Judge I agree. Section 406 (2) of the Civil Procedure Code enacts that "if the plaintiff withdraw from the action, or abandon part of his claim, without such permission (the permission of the Court referred to in sub-section (1)) . . . he shall be precluded from bringing a fresh action for the same matter or in respect of the same part". As I have already said, no permission was obtained. There is authority for saying that "if there are several defendants to a suit and the plaintiff withdraws his suit against some of the defendants alone, without the liberty of suing again being reserved and obtained, a subsequent suit against them will be barred".

Permission is given when there are formal defects as, for instance, misjoinder of parties or causes of action, or where "there are sufficient grounds". It would not, or rather should not, be given where a party



on the averments in the plaint, has been properly impleaded as a defendant, and the plaintiff, however badly advised he may have been, in effect says "my pleading against the defendant cannot be sustained and I submit to my case, in so far as he is concerned, being dismissed". In such a case, and this is precisely such a case, the order of dismissal is conclusive. No "permission" by the Court could properly be given, even if permission, as was not the case, was asked for by the appellant.

It was argued on behalf of the appellant that by virtue of the provisions of section 16 of The Mortgage Ordinance he was entitled to file a separate suit against the respondent. Assuming that he was, he did not, and the bar to a fresh suit is not removed, because he might have done what he did not do.

The appeal is dismissed with costs.

DE KRETZER J.—I agree.

*Appeal dismissed.*

