1963 *Present :* **L. B. de Silva, J., and Abeyesundere, J.**

H. M. KALU BANDA and another, Appellants, *and*
S. K. B. A. D. DAVID APPUHAMY, Respondent

S. C. 274/1961—D. C. Kurunegala, 13,392/L

Res judicata—*Same parties and subject matter in two* rei vindicatio *actions—New title acquired by one party after the decree in the earlier case—Validity—Civil Procedure Code, s. 207.*

A decree entered in favour of the plaintiff in an action for declaration of title to a divided portion of a 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, title to which was acquired by the defendant from a third party subsequent to the decree in the earlier action.

APPEAL from a judgment of the District Court, Kurunegala.

C. R. Gunaratne for 1st and 2nd Defendants-Appellants.

T. B. Dissanayake, for Plaintiff-Respondent.

Cur. adv. vult.

October 22, 1963. L. B. DE SILVA, J.—

By decree (P3) dated 26/9/52 the plaintiff was declared entitled to a divided portion of the land called Medawatta *alias* Alutwatta subsequently depicted as lots 1, 2, 3, 5 and 6 in plan No. 1136 of 1954 (P4) in D. C. Kurunegala Case No. 5554 as against the 1st. and 2nd. defendants. These lots are identical with lots 1, 3, 5, 6, 7, 10, 11, 12, 14A, 20 and 26 marked in red in plan No. 1267 of 13.2.59.

The 1st. and 2nd. defendants claim title in this case to Lot 9 only in plan No. 1267 on a title independent of that set out by them in D. C. Kurunegala No. 5554. They allege that T. P. Baptist was entitled to the land depicted in T. P. 14977 marked " X " attached to the Crown Grant X1 of 1937. Admittedly the title plan " X " includes Lot 9 now claimed by the 1st. and 2nd. defendants.

According to the defendants, the title of Baptist devolved on Saman on deeds D1 to D4. Saman by deed 3395 dated 25/5/1955 (D5) conveyed his rights to 1 and 2 defendants. The deed (D5) in favour of 1st. and 2nd. defendants was executed subsequent to the decree (P3) in favour of the plaintiff.

At the trial, certain issues were raised and two of them related to the question of res judicata. They were as follows :—

Issue (3). Is the decree in case No. 5554 res judicata between the parties ?

Issue (7). Is the decree in case No. 5554 res judicata in regard to the title now set up by the 1st. and 2nd. defendants ?

The issue relevant to the present dispute is really Issue (7). The learned District Judge answered these issues in favour of the plaintiff and entered judgment for plaintiff as prayed for with costs but limiting the damages as agreed to by the parties. The 1st. and 2nd. defendants have appealed from this judgment and decree.

The Law of res judicata applicable in this case is the Roman Dutch Law, subject to the amendments set out in sections 34, 207 and 406 of the Civil Procedure Code. Of these sections, it is only section 207 that has any semblance of an application to this case. Under the explanation to that section, every right to property . . . . . *which can be claimed, set up or put in issue* between the parties to the 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 action for the same cause of action between the same parties.

The right to this property which the 1st. and 2nd. defendants acquired from a 3rd. party, subsequent to the filing of the previous action and its decree, could not possibly have been claimed, set up or put in issue by these defendants in the previous case.

Under the Roman Dutch Law, Voet says: " There is nevertheless no room for this exception unless a suit which had been brought to an end, is set in motion afresh between the same persons, about the same matter and on the same cause of claiming, so that the exception falls away if one of these three things is lacking." (Bk. XLIV—Tit. 2. section 3—Gane Vol. 6. p. 554). This passage was cited with approval by His Lordship the Chief Justice Basnayake in *Sathuk v. Layaudeen* [1].

In this case are the appellants setting up the cause of claiming as in the previous action ? No doubt the parties are the same and the subject matter is the same. Under Bk. XLIV—Tit. 2. Section 4, Voet states " *Action may be the same, but cause different.* Then again conversely it can happen that the same action indeed is set in motion as had been set in motion by the earlier judicial proceeding, but nevertheless the cause for claiming is not for that reason the same. Instances would be if he who has sought to vindicate a thing and has gone down, claims the same thing afterwards over again when he has acquired the ownership, or if a defendant who has been absolved from an earlier judicial

[1] *(1960) 63 N. L. R. at p. 28.*

proceeding because he was not in possession of the property, is sued afresh in a vindicatory action when he has thereafter begun to have the possession " (Gane—Vol. 6—p. 557).

Counsel for the Plaintiff-respondent relied on certain decisions that appeared to support his case. He cited the case of *Abdul Rahiman v. Ismail and others* [1]. Wood Renton C.J. stated, " But it was argued that, in spite of the decree in D. C. Galle No. 7933, the 1st. defendant can still contest the plaintiff's right to the land on the strength of his conveyance from Pathu Muttu, who was no party to the former action. I entirely agree with the learned District Judge that he cannot do so. Whatever might be the position of Pathu Muttu in the matter, the 1st. defendant is himself bound by the decree in D. C. Galle No. 7933. The question then decided against him was whether the land in suit was the identical land referred to in a Kadutan granted to the plaintiff onhis marriage and if so, whether he had acquired title to it by prescription ". The principles of law involved, if I may respectfully say so, have not been considered and laid down in that case.

There is a conflict of views in the Indian Courts as to what are the rights to property etc. that can be claimed, set up and put in issue between the parties upon the cause of action sued upon.

In " Treatise on the Law of Res Judicata " by Hukm Chand—1894, the author refers at p. 88 to the English case of *Hunter v. Stewart* [2], where Lord Westbury L.C., observed: " the case made by the 2nd. bill must be taken to have been known to the plaintiff at the time of the institution of the first and might have been then brought forward, and it may be said, therefore, that it ought not now to be entertained, but I find no authority for this proposition in civil suits, and no case was cited at the Bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking for the same relief, but stating a different case giving rise to a different equity ".

At page 90, he states that this case has been followed in several cases in India and gives references to them. At page 92, Section 45, he states, " The contrary also appears to have been held in some cases, but chiefly on the ground that section 2 of the Code of 1859 barred a subsequent suit on the same cause of action and the decisions under that Code had reference to the identity of the cause of action, the question of the title, which at least, in real suits was not identical with it, having come into consideration, if at all, incidentally ".

But this conflict of Indian decisions has no application to a case where a party to the former suit, has acquired a new and independent title to the subject matter of the former litigation subsequent to the decree in the earlier action.

[1] *(1917) 4 C. W. R. 1.*

[2] *(1862) 31 L. J. Ch. 346.*

The decision in *Abdul Rahiman v. Ismail and others* (*supra*) was followed in *Johanis v. Punchi Hami* [1]. In that case, it was held that a person who had purchased a land from the Crown after a partition Decree had been entered for that land, was bound by that decree though the Crown was not bound by that decree.

In *Annamalay Chetty v. Thornhill* [2], it was held that the dismissal of an action for non-compliance with the requirements of the Business Names Registration Ordinance, was no bar to a subsequent action on the same cause of action as the dismissal was not in the exercise of its jurisdiction over the subject matter of the action but for non-compliance with a condition for the exercise of its jurisdiction.

The last two decisions can be distinguished and are not of assistance in the decision of the point of law raised in this case.

As the appellants are setting up a new and independent title which they acquired after the decree in the earlier case, to the Lot in dispute, we hold that their cause for claiming is different from the claim they set up in the earlier action and it is not barred by the plea of res judicata.

The Issues should be answered in this case as follows :—

3. Yes, but it does not affect the title put forward by 1st. and 2nd. defendants in this case.

7. No.

The Judgment and Decree entered in favour of plaintiff is set aside and the case is sent back to the District Court for trial on the other issues in the case. The 1st. and 2nd. defendant-appellants are entitled to the Costs of the proceedings in the District Court on 25.5.61 and of this Appeal.

ABEYESUNDERE, J.—I agree.

Appeal allowed.