Present : Bertram C.J. and Jayewardene A.J.

1924.

SENARATNA *v.* PERERA *et al.*

14—D. C. Kurunegala, 8,448.

Res judicata—*Action between co-owners—Added defendants—Adjudication between defendants* inter se—*Adverse claims.*

Where a co-owner sues another to obtain a declaration of title to the undivided share he claims, and the other co-owners are joined to enable him to prove his title in their presence, the judgment obtained by him would be *res judicata* between the plaintiff and the defendants, but not between the defendants *inter se.*

The principle that the decision is not *res judicata* between co-defendants is subject to two exceptions:

(*a*) When a plaintiff cannot obtain the relief he claims without an adjudication between the defendants, and such an adjudication is made, the adjudication so made is *res judicata* not only between the plaintiff and the defendants, but also between the defendants.

(*b*) When adverse claims are set up by the defendants to an action, the Court may adjudicate upon the claims of such defendants among themselves, and such adjudication will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants.

Provided that in either case the real rights and obligations of the defendants *inter se* have been defined in the judgment.

APPEAL from a judgment of the District Judge of Kurunegala.

The plaintiff sued the first and second defendants to be declared entitled to ⅓ of 5/9 of the land depicted in the plan, which he said was a divided portion of the land called Nugagahamullahenyaya. The first and second defendants called it Siyambalagahawatta. The third, fourth, and fifth defendants were joined as co-owners of the plaintiff. All parties claimed title from the same source—the fourth defendant. The third and fifth defendants filed answers supporting the plaintiff's contention and claiming certain shares. The main issue which was common to the plaintiff and the third and fifth defendants was as follows :—Is the land described in the plan identical with the land called and known as Nugagahamullahenyaya ? The learned District Judge held that the first and second defendants were attempting to take advantage of a mistake in the deed under which the plaintiffs claimed, and that the land claimed by the plaintiffs as Nugagahamullahenyaya was identical with the land sold to the first and second defendants by the fourth defendant under the name of Siyambalagahawatta. He dismissed the plaintiff's claim, with costs, but directed the third

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and fifth defendants to bear their own costs. The first and second defendant's appeal against the judgment was dismissed with costs. In their cross-appeal the third and fifth defendants urged that as they, with the plaintiff, had succeeded on the main issue, they be declared entitled to the shares claimed by them. This was opposed on behalf of the first and second defendants on the ground that no such adjudication can be made in the present case as these parties are co-defendants, and that the decision cannot operate as *res judicata* between them.

E. J. Samarawickreme, for first and second defendants, appellants.

Drieberg, K.C. (with him *Croos Da Brera*), for plaintiff, respondents.

Soertsz, for third and fifth defendants, respondents.

September 18, 1924. JAYEWARDENE A.J.—

In this case there is an appeal and a cross-appeal. The appeal is between the first and second defendants and the plaintiff and third and fifth defendants, and the cross appeal is between the third and fifth defendants and the first and second defendants.

The plaintiff sued the first and second defendants to be declared entitled to ½ of 5/9 of the land depicted in the plan filed in the case, which he said was a divided portion of the land called Nugagahamullahenyaya.

The first and second defendants called it Siyambalagahawatta. The third, fourth, and fifth defendants were joined as co-owners of the plaintiff. All the parties claimed title from the same source—that is, from the fourth defendant. The third and fifth defendants filed answers supporting the plaintiff's contention and claiming certain shares. On the day of trial the learned District Judge framed the issues suggested by the plaintiff's proctor, and did not accept the issues suggested for the third and fifth defendants. The main issue which was common to the plaintiff and the third and fifth defendants was the second one framed, which ran as follows:—" Is the land described in plan No. 656 dated July 18, 1922, identical with the land called and known as Nugagahamullahenyaya described in the plaint? " After a long trial the learned District Judge in a well-considered judgment held that the first and second defendants were attempting to take advantage of a mistake in the deeds under which the plaintiff claimed, and that the land claimed by the plaintiff as Nugagahamullahenyaya was identical with the land sold to the first and second defendants by the fourth defendant under the name Siyambalagahawatta.

He dismissed the plaintiff's claim with costs, but directed the third and fifth defendants to bear their own costs. The first and second defendants appeal against this judgment, but, after listening

to all that appellant's counsel had to urge, it seemed impossible to say that the learned District Judge was wrong. On the other hand, the analysis of the boundaries given in the numerous deeds made by my Lord the Chief Justice demonstrated conclusively that the conclusion arrived at by the District Judge was the only one possible.

The appeal of the first and second defendants must accordingly be dismissed, with costs, in favour of all the respondents.

But the cross-appeal of the third and fifth defendants raises a point of some importance. As I said the third and fifth defendants filed answers and supported the plaintiff's case. The third and the fifth defendants also claimed to be declared entitled to 71/216 and 23/72 shares of the land, respectively, and alleged that the first and second defendants were in forcible possession of their shares. They also claimed damages. The issues suggested for the third defendant, which, as I said, the Court did not frame, raised the question of wrongful possession by the first and second defendants and damages.

At the trial they were represented by their proctors who took part in the trial, and read certain documents in evidence.

At one stage of the proceedings the third defendant's proctor moved that the third defendant be made a co-plaintiff, but this was objected to and refused. In their cross-objection they urge that they, with the plaintiff, have succeeded on the main issue and have established their title to the shares claimed by them. They ask that the decree be amended, and that they be declared entitled to the shares claimed and to damages. This is objected to by counsel for the first and second defendants, who urges that the third and fifth defendants were merely formal parties, that no adjudication can be made in the present action as these parties are co-defendants, and that a decision between the real and necessary parties can never operate as *res judicata* between co-defendants.

Therefore, he contends that the decision of the Court on the second issue that the land in question is the land called Nugagahamullahenyaya, according to the plaintiff and the third and fifth defendants' title, would be *res judicata* between the plaintiff and the first and second defendants, it could not have that effect as between the third and fifth defendants and the first and second defendants. In support of his contention he relies on a passage from the judgment of my Lord in *Mariammai v. Pethrupillai*,[1] where the Chief Justice said that "nothing is *res judicata* except between persons who were at issue on the occasion when the thing was adjudged or persons claiming through them."

But it is argued for the third and fifth defendants that the decision of the first issue is *res judicata* even between co-defendants, and that their rights ought to be settled in this litigation.

[1] *(1918) 21 N. L. R. 200.*

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It becomes necessary to test the soundless of the contention that a decision can never be *res judicata* between co-defendants.

In my opinion, formed after a careful examination of the authorities on the subject, the principle that a decision is not *res judicata* between co-defendants is subject to two exceptions:

(*a*) When a plaintiff cannot obtain the relief he claims without an adjudication between the defendants, and such an adjudication is made, the adjudication so made is *res judicata* not only between the plaintiff and the defendants, but also between the defendants.

(*b*) When adverse claims are set up by the defendants to an action, the Court may adjudicate upon the claims of such defendants among themselves, and such adjudication will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants.

Provided that in either case the real rights and obligations of the defendants *inter se* have been defined in the judgment.

The first exception is based on a dictum of Wigram V.C. in *Cottingham v. Earl of Shrewsbury* [1]:—

> " If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

It was formulated in India by Sir Raymond West in *Ramachandra Narayan v. Narayan Mahadev*,[2] and is now accepted as laying down a sound principle by all the High Courts in India *Caspersz on Estoppel and Res judicata, Part II., p. 186 (3rd ed.)*,

The second exception arises from the ordinary rule of *res judicata* that where a matter in a controversy or a point in issue between two parties has been heard and decided, such decision is *res judicata*, and cannot be controverted in any subsequent litigation.

These principles are of universal application. See *Hukm Chand Res judicata, pp. 170-177.*

Instances of the first exception are rare, and almost all the decisions in the Indian Reports are cases where the plea of *res judicata* between persons who had been co-dependants has been successfully resisted. They are likely to occur in mortgage actions. Thus, if a mortgagee brings an action to realize his mortgage against his mortgagor, and impleads a prior mortgagee whose bond he impeaches as being vitiated by fraud and duress, it would be necessary for

[1] *(1843) 3 Hare 627.*

[2] *(1886) 11 Bom. 216.*

the plaintiff, if he wishes to obtain a clean mortgage decree, to prove his allegations of fraud and duress. If he succeeds on an issue of fraud and duress, and obtains a judgment that the prior mortgage is invalid, such a judgment or decision would be *res judicata*, not only between the plaintiff and the defendants, but also between the defendants *inter se*. Instances of the second exception are equally rare, for, Courts are reluctant to enter upon an inquiry into the disputes arising between the defendants *inter se* and unconnected with the claim of the plaintiff, when once the plaintiff's rights have been adjudicated upon. But there may be instances in which the Court has been induced to decide issues arising between co-defendants and to define their rights and obligations. In such a case, the decision would be binding between the defendants between whom the issue had arisen. There is nothing in our Statute law to prevent a *res judicata* between co-defendants.

The explanation to section 207 which treats of the finality of decrees and *res judicata*, no doubt enacts that every right arising between the parties to an action *upon the cause of action for which the action is brought*, whether claimed, set up, or put in issue or not, becomes a *res judicata* on the passing of the final decree, but it has been held that section 207 and sections 34 and 406 of the Civil Procedure Code do not embody the whole law of *res judicata* in Ceylon, that the law of *res judicata* in Ceylon has its foundation in the civil law which contains the maximum: "*Nemo debet bis vexari pro eadem causa*," and that the general principles of the law of *res judicata* obtaining in England, America, and India, which are not inconsistent with the provisions of the Civil Procedure Code, are applicable here: *Samichi v. Pieris* [1] *and Velupillai v. Muttupillai.* [2]

As I pointed out in my judgment in the latter case, a decision on every point in issue, or matter in controversy in a case, is a *res judicata*, and the identity of cause of action is immaterial. The second exception can, therefore, be given effect to in Ceylon.

In cases in which, where a co-owner sues another, all the co-owners are added, there is hardly every any decision on the rights of the defendants *inter se*. The co-owners are joined to enable the plaintiff to obtain a declaration of title to the undivided share he claims or proves he is entitled to in the presence of the other co-owners. Such a judgment would be *res judicata* between the plaintiff and the defendants, but not between the defendants *inter se*.

Applying these principles to the present case, it is clear that the decision that the land in suit is the land Nugagahamullahenyaya referred to in the deeds in favour of the plaintiff, and the first and second defendants is not *res judicata* between the first and second defendants on the one side and the third and fifth defendants on the other.

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[1] *(1913) 16 N. L. R. 257.*

[2] *(1923) 25 N. L. R. 261.*

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The third and fifth defendants had no interest in the 5/27th share claimed by the plaintiff. No issues were framed between them. They were no doubt concerned in the decision of the issue as to the identity of the land, but that is not sufficient.

The plaintiff could have obtained the relief he claimed without any adjudication upon their rights. Their rights have not been ascertained or defined. They do not come within either of the exceptions. Their case is similar to that of the plaintiff in *Rajkamarie Debi v. Neityapali Debi*,[1] in which a plea of *res judicata* was unsuccessfully raised. There a co-owner had been added as a *pro formâ* defendant, but she had no interest in the undivided share claimed by the plaintiff. She supported the theory put forward by the plaintiff as the basis of his title. The real defendant claimed a share of the property on a different basis. The litigation terminated in favour of the real defendant. The heirs of the *pro formâ* defendant brought the second action, and it was held that the decision in the first case was not *res judicata* between the defendants. Mookerjee J. saying:—"To put the matter briefly, there was not any conflict of interest between the then defendants. Consequently as ruled in the cases of *Cottingham v. Earl of Shrewsbury* (*supra*) *Ramachandra v. Mahadev* (*supra*), *Maginsam v. Mehdi Hussein*,[2] *Gurdee v. Chandripiah*,[3] *and Ghumphelani v. Parmeshar*,[4] as there was no judgment defining the real rights and obligations of the defendants *inter se*, the principle of *res judicata* can have no application."

In a case like the present, the Court might consider whether it should not act as Courts of Equity do in England and in America, as our Courts are Courts of Law and Equity. Such a practice would save the parties much trouble and expense, as was pointed out by Lord Eldon in *Chamley v. Lord Dunsany* [5]:—"Where a case is made out between defendants, by evidence arising from pleadings and proof between plaintiffs and defendants, a Court of Equity is entitled to make a decree between the defendants. Further, my Lords, a Court of Equity is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit."

In the same case Lord Redesdale said:—"It seems strange to object to a decree because it is between co-defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled and acted upon, and the constant practice of Courts of Equity." See *Caspersz on Estoppel, Part II., p. 185 (3rd ed.)*

[1] *(1910) 12 C. L. J. 434 (435).*
[2] *(1903) 31 Cal. 95.*
[3] *(1907) 36 Cal. 193.*
[4] *(1907) 5 C. L. J. 653.*
[5] *(1807) 2 Sch. and Lef. 690.*

We must, however, bear in mind the protest of another great Equity Judge, Jessel M. R., against such a procedure in *Kevan v. Crawford* [1]:—" What right has a Court of Justice," he asked, " to investigate a claim by title paramount by one co-defendant against another ? I am not aware of any. The answer is, if you wish to assert these claims, you must assert them in a proper action."

In America the procedure indicated by Lords Redesdale and Eldon is adopted in Chancery suits, *Bigelow on Estoppel, p. 114.*

In the present case, however, the third and fifth defendants acquiesced in the Court's refusal to frame the issue suggested by them, and their rights have consequently not been ascertained and defined. There is, therefore, no decision or decree which they can plead as *res judicata* against the first and second defendants.

Their appeal also must be dismissed, with costs.

BERTRAM C.J.—I agree.

Appeal dismissed.