1961 *Present :* Gunasekara, J., and T. S. Fernando, J.

D. DHARMADASA, Appellant, *and* PIYADASA PERERA, Respondent

S. C. 71 (Inty.) of 1959—D. C. Colombo 742/Z

Res judicata—*Decree for default—Can such a decree operate as* res judicata *?—Meaning of word "decree"—Civil Procedure Code, ss. 84, 85, 86, 188, 192, 206, 207.*

A decree absolute for default that has been passed against a defendant by a District Court is one to which section 207 of the Civil Procedure Code applies and can, therefore, operate as *res judicata* in a subsequent action between the same parties in respect of the same subject-matter.

Herath v. The Attorney-General (1958) 60 N. L. R. 193, discussed.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the defendant-appellant.

S. C. E. Rodrigo, for the plaintiff-respondent.

Cur. adv. vult.

August 4, 1961. GUNASEKARA, J.—

The question that has been argued in this appeal is whether a decree absolute for default that has been passed against a defendant by a district court is one to which section 207 of the Civil Procedure Code applies.

The subject of the present action is the piece of land depicted as Lot 1 in the plan X. In an earlier action between the same parties, case No. 4894/L of the District Court of Colombo, instituted on 27th March, 1947, the appellant sued the respondent for a declaration of title to the same piece of land, for ejection of the respondent from it and for other consequential relief. The property had formed part of the estate of the respondent's father Gabriel Perera, who had died leaving a last will by which he appointed his widow Egodage Catherine Perera his executrix and which was in due course admitted to probate. The appellant claimed in case No. 4894/L that the land had been sold by Catherine Perera as executrix in order to pay the debts of the estate and that the appellant had purchased it from her upon two deeds, No. 67 of 24th May, 1946 and No. 88 of 29th November 1946, attested by Mr. Q. M. R. Jayamanne, notary public, and she alleged that the respondent was unlawfully in possession of it. The respondent in his answer denied the appellant's claim. He also averred that

> " the Last Will referred to in the plaint contained the provision : ' I give, devise, and bequeath all my immovable property to my wife Egodage Catherine Perera subject to the condition that she shall not be at liberty to sell mortgage or gift or otherwise alienate the said property or any portion thereof, but she shall have the right only to hold and possess and enjoy the profits and income therefrom during her lifetime and on her death the same shall devolve on Magalage Piyadasa Perera ' (the respondent)."

He failed to appear on the day fixed for the trial, which was the 24th of February 1948. The appellant appeared on that date, and after an *ex parte* trial the Court passed a decree *nisi* in terms of section 85 of the Civil Procedure Code, declaring the appellant entitled to the land and ordering that the respondent be ejected and the appellant placed in possession of it. On 26th May 1948 this decree was made absolute in terms of section 86 of the Code, after the respondent had unsuccessfully attempted to purge his default, and the fiscal placed the appellant in possession of the land on 22nd September 1948. On 30th October, 1957 the respondent instituted the present action, claiming that a cause of action had accrued to him to sue the appellant

> " to have it declared that the said land is bound by fideicommissum in favour of the plaintiff and to have the deed No. 67 of 24th May, 1946 attested by Q. M. R. Jayamanne, Notary public, declared null and void and for possession of the said land and premises, "

and praying for these reliefs. The appellant in her answer denied the respondent's claim and also pleaded that the decree in case No. 4894/L operated as *res adjudicata* which barred this action.

At the trial the issue of *res judicata* was tried as a preliminary issue and the learned District Judge decided it in the respondent's favour on the ground that section 207 of the Civil Procedure Code applies only to decrees drawn up under section 188 of that Code. He held that he was bound by the view expressed in a passage which he quoted from the judgment of my lord the Chief Justice in the case of *Herath v. The Attorney-General* [1], which was heard by a bench consisting of the Chief Justice, Pulle J. and de Silva J. The quotation reads :

> " Section 206 provides that the decree or certified copy thereof shall constitute the sole primary evidence of the decision or order passed by the Court. The preceding provisions of the Chapter in which section 207 occurs show to my mind that the decrees spoken of in that section are decrees drawn up by the Court under section 188 after judgment has been pronounced in the manner contemplated in sections 184, 185, 186 and 167. Such decrees are final between the parties subject to appeal. Section 207 will therefore apply to decrees pronounced after there has been an adjudication on the merits of a suit and not to decrees entered under section 84. "

The Chief Justice also held that section 207 did not apply to the decree that was in question in that case because it was not a decree in an action between the same parties or for the same cause. Pulle J. held that the plea of *res judicata* failed substantially for the reason that the parties in the two actions were different. He did not agree with the view expressed in the passage quoted above, for he said :

> " That the dismissal of the action was a bar to a fresh action against one or other of the parties on the same cause of action, assuming that the District Judge had jurisdiction to try case No. 3632 on its substantive merits, is plain enough. " [2]

de Silva J. merely expressed his agreement with the order proposed to be made. It seems to me that the District Judge was not bound by the dictum that he has quoted any more than he was bound by the contrary view that is expressed in the judgment of Pulle J.

The present case is distinguishable from that of *Herath v. The Attorney-General* (*supra*), being a case of a decree entered after there had been an adjudication on the merits of the suit in that there was an *ex parte* trial under section 85 of the Code. In any event I respectfully disagree with the view that the term " decree " as used in Chapter 20 of the Code must be given the meaning that is given to it in the passage quoted from the learned Chief Justice's judgment. Some of the consequences of that interpretation would be that a Court would have no power to correct a clerical or arithmetical mistake in a decree entered under section 84 or 85 ; the requirements laid down in sections 190 and 191 as to the contents of decrees relating respectively to immovable property and to the delivery

[1] *(1958) 60 N. L. R. 193 at 221.* [2] *Ibid. at 226.*

of movable property would not apply to a decree entered under section 85 ; and the provisions of section 192, empowering a court to include in a money decree an order for the payment of interest, would not apply to such a decree if it was entered after an *ex parte* trial. I do not think that there is anything in the context to suggest that the legislature intended that the word " decree " should be given a meaning that would lead to such consequences.

In my opinion the preliminary issue must be answered in the defendant appellant's favour. The appeal must be allowed with costs in both courts and the plaintiff respondent's action must be dismissed.

T. S. FERNANDO, J.—I agree.

Appeal allowed.