1954 *Present :* **Sansoni J. and Fernando A.J.**

K. K. SILINDUHAMY *et al.*, Appellants, *and*
P. WEERAPERUMA, Respondent

S. C. 181—D. C. Galle, 4,395

Res judicata—*Several previous but conflicting decisions—Principles applicable then—Partition action.*

In an action for the partition of what was described by the plaintiff as a land consisting of two portions (A and B) the contesting defendants took up the position that the two portions were distinct and separate lands in one of which the plaintiff had no share and, therefore, that the two lands could not be joined in one action for partition.

There had been three earlier actions—Cases Nos. 1, 2 and 3—in regard to the same point in dispute. In Case No. 1 it was held that portions A and B constituted one land. On this question it was decided in Case No. 2 that the previous decree in Case No. 1 was *res judicata*. The question arose again in Case No. 3 where the defendants pleaded the decree in Case No. 1 as *res judicata*, but the decree in Case No. 2 was not pleaded as *res judicata*. It was

however, decided in Case No. 3 that A and B were two separate adjoining lands. In Case No. 3 the predecessors in title of the plaintiff and contesting defendants of the present action were parties.

Held, that, for the purpose of deciding the present action, the decisions in Cases Nos. 1 and 2 were superseded by the decision in the later Case No. 3 which was *res judicata* as between the plaintiff and the contesting defendants. Two principles governed the matter, viz., (1) A judgment of a Court of competent jurisdiction directly upon the point in dispute is a bar between the same parties or those claiming through them if pleaded; but if not so pleaded, the matter is left at large. (2) Where there are conflicting judgments *inter partes*, the later adjudication should be taken as superseding the earlier.

APPEAL from a judgment of the District Court, Galle.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the 4th, 11th and 19th defendants appellants.

Cyril E. S. Perera, Q.C., with *A. W. W. Gunawardene*, for the plaintiff respondent.

Cur. adv. vult.

September 24, 1954. SANSONI J.—

The plaintiff-respondent brought this action for the partition of a "land called Rukmalgahaowita and Kumbura adjoining each other situated at Aluttanayamgoda in Mapalagama in the Gangaboda Pattu of the District of Galle, Southern Province, and bounded on the North by Diganegoda Potuwila, East by Modera Pelessa, South by Kamarangeowita and West by Walagawawatta containing in extent about five acres (5 A. 0 R. 0 P.)". He traced title to the land from two persons, Liyanage Nonnehamy and Liyanage Seuhamy who were alleged to have owned the land in the proportion of 7/8 and 1/8. Nonnehamy married Ketipe Kankanange Adirian in community of property and the latter died leaving his widow who then got 7/16 share and the four children Udaris, Andiris, Nonahamy and Babahamy who each got 7/64 share. The widow Nonnehamy by deed P1 of 12th September, 1901, sold her 7/16 share to Singhoappu, and the plaintiff by purchase on deed P3 of 1942 claims that share. The 19th defendant has purchased certain interests out of Udaris' share in the southern portion of the land. Andiris married Gimara and they had two children the 4th and 20th defendants who sold their share to the 11th defendant. With regard to Seuhamy's 1/8th share, on her death it passed to her four children Sancho, Aranolis, Endiris and Dingihamy. Sancho's share was bought at a sale in execution against her by Karunaratne and Abeyhamy on Fiscal's Conveyance P8 of 1906, and that share has devolved on the plaintiff. Endiris' share in the southern portion was bought by Gimara on deed 11D2 of 1911, and on Gimara's death it passed to her children the 4th and 20th defendants who sold it to the 11th defendant. I have referred to the devolution of only some of the shares in order to set out how the disputes in this appeal arise.

The plaintiff's case was that the entire land comprising of the 11 lots A to K, as depicted in the plan Z was the land to be partitioned. He pleaded that the judgments and decree in C. R. Galle Cases Nos. 749 and 9212 were *res judicatae* and binding on the defendants. The 4th, 11th and 19th defendants, whom I shall refer to as the contesting defendants, filed a joint answer. They took up the position that the 4 lots A, B, C, and D form a paraveni land called Rukmalgaha Owitagoda Owita of which Liyanage Nonnehamy owned 7/8 share while the remaining 7 lots E to K form a distinct and separate divel land called Rukmalgaha Owita and Kumbura which formerly belonged to Liyanage Adirian. These defendants further pleaded the judgment and decree in C. R. Galle Case No. 4923 as *res judicata*. It was the case of the contesting defendants that the land shown in plan Z comprised two separate lands, viz., a divel land (lots E to K) lying north of the ridge which runs from West to East, part of it paddy field and part owita, and a distinct paraveni land (lots A to D) lying south of the ridge. An examination of the earlier deeds produced establishes this position beyond any doubt. In 1879 Liyanage Adirian, who the contesting defendants say was the former owner of the divel land, leased the owita portion of it to Weerasinghe de Silva by deed 11D6 for four years. The land leased is described as Rukmalgaha owita of 3 pelas. In a subsequent deed of lease 11D7 of 1890 between the same parties the leased premises are described as Rukmalgaha divel owita. But the divel land also contained a field portion (lots 1, J and K in plan Z), in extent 3 pelas and in 1899 Liyanage Adirian sold the entire divel land by deed 11D4 to Ketipe Kanakanange Andiris de Silva, describing it as Rukmalgaha Kumbura and Owita of 6 pelas. The boundaries mentioned in that deed are important and they are :—

North—Digane Godage Pothuwila,

East—Diyaambe Owita and Watte,

South—*Rukmalgahaowita Paraveniwatte*,

West—Walagawa wagura.

The earlier document in respect of the southern or paraveni portion (lots A to D) is a Fiscal's transfer 11D9 of 1886 issued after a sale in execution held in 1880 against Nonahamy's son Udaris. The following description of the land appears in it—Rukmalgahaowita bounded as follows :—

North—*Rukmalgahaowita Divel owita*,

East—Moderapelessa Owita Divel Watta,

South—Kaberankka owita and Batelewatte.

West—Nugagahawite Medewatte and Walagavawatta.

There is no reason why these old documents should be disregarded when one has to examine the question whether there was one land, as the plaintiff says, or two lands as the contesting defendants say. What is more, since 1879 Liyanage Adirian who is the predecessor in title of the contesting 4th and 11th defendants was dealing with the divel portion

to the north of the ridge on the footing that it belonged solely to him He sold the entirety to K. K. Andiris in 1899, the latter being the son of Nonnehamy and K. K. Adirian ; on the death of Andiris and his wife Gimara this land is said to have devolved on their sons the 4th and 20th defendants, and the 20th defendant sold this divel portion (along with the paraveni portion to the south) to the 11th defendant.

But the plaintiff's reply to the strong case made out on the old deeds is that there was a decision in an action C. R. 749 of 1898 which is binding on the contesting defendants. Now that action was filed by Liyanage Nonnehamy (already referred to) against 8 defendants, one of whom (Endiris) subsequently sold his 1/32 share of the paraveni portion to Gimara by deed 11D2 of 1911, and in that way he may be said to be a predecessor in title of the 4th and 11th defendants. Nonnehamy for herself and her children (though they were not added as parties) obtained declaration of title to 7/8 of the entire land sought to be partitioned in this action. The remaining 1/8 share presumably was the property of Seuhamy from whom certain of the defendants in that action (including Endiris) claimed to have inherited it. It is not necessary to consider the legal effect of the failure to add Nonnehamy's children as parties, or even to consider to what extent the decree in that action would be *res judicata* against the contesting defendants, because there were two later actions which render it unnecessary to consider these matters. In 1907 Karunaratne and Abeyhamy (who are the plaintiff's predecessors in title in respect of 1/4th of the 1/8th share which belong to Seuhamy) sued Gimara, Endiris and another in C. R. No. 9212 for a declaration of title to their 1/32 share of the entire land sought to be partitioned. The defendants resisted the claim on the ground that the plaintiffs were entitled to 1/32 share only of the paraveni portion while the divel portion belonged to Gimara alone. The Commissioner of Requests decided that the previous decree in C. R. Case 749 was *res judicata* on this question. I do not intend to discuss the validity of this decision or its effect either, for reasons which I shall presently give. In my opinion the decree entered in the next case C. R. 4923 is all important. In that case Gimara (who is the 4th and 11th defendants' predecessor in title) sued the present plaintiff's and the present 3rd defendant's predecessors in title, viz., Sinnoappu and Babahamy in respect of the divel portion only. She complained that the defendants had claimed 7/16 share of the land and she asked that she be declared entitled to and quieted in possession of that share. The defendants filed answer pleading the decree in C. R. No. 749 as *res judicata*, but the decree in C. R. 9212 was not pleaded as *res judicata*. Sinnoappu further pleaded that he was entitled to 7/16 share by purchase from Nonnehamy after the decision of C. R. 749 (on the footing that Nonnehamy was entitled to 1/2 of 7/8), while Babahamy pleaded that she was entitled to 7/64 as one of the 4 children of Nonnehamy who were entitled under that decree to the remaining 1/2 of 7/8. The two defendants asked that they be declared entitled to 7/16 plus 7/64 shares of the portion in dispute. The portion in dispute was clearly depicted in the plan made for that case and corresponds to the portion claimed in this action also as the divel land. Decree was entered declaring Gimara entitled to these very shares which the two defendants had

claimed. The Commissioner of Requests in his judgment held that Gimara was not estopped from showing that there were two separate adjoining portions, one divel and the other paraveni, and that Liyanage Adirian was the former owner of the divel portion.

We thus have the very dispute which has been raised in this action considered and decided in that case to which the plaintiff's and the 3rd defendant's predecessors in title on the one hand, and the contesting defendants' predecessors in title on the other, were parties. The plaintiff's and the 3rd defendant's predecessors in title put forward the claim which is now put forward in this action and they failed to establish it. In passing I would refer to the two principles which must govern this matter. One is that a judgment of a Court of competent jurisdiction directly upon the point in dispute is a bar between the same parties or those claiming through them if pleaded; but if not so pleaded, the matter is left at large (*Feversham v. Emerson*[1]). The other principle is that when there are conflicting judgments *inter partes*, the later adjudication should be taken as superseding the earlier (*Akkammal v. Komarasami Chettiar*[2]). Both principles apply to the judgment and decree in C. R. case No. 4923, and it is for this reason that I consider the decisions in the two earlier cases to be of no importance. They were superseded by the decision in the third case which is *res judicata* as between the plaintiff and the 3rd defendant on the one hand and the contesting defendants on the other.

The learned District Judge after discussing the issue of *res judicata* held that the contesting defendants are bound by the decree in C. R. No. 9212 and cannot now be heard to say that the 7 lots E to K form a separate land. He took the view that as no evidence had been led to show what the issues were in C. R. No. 4923 the decision in that case is not *res judicata*. I have already referred to the claims of the parties in that case and upon those claims the 2 issues which arose (even though they were not framed before evidence was led) were (1) whether there were two lands or only one and (2) whether Gimara or the two defendants owned the shares in dispute out of the divel land. The learned Judge also points out that some of the more recent deeds describe the entire land shown in the plan Z. But where the parties executing them were entitled to deal only with the paraveni portion, this circumstance cannot convert the two distinct lands into one land. The boundary which the contesting defendants rely on as separating the two lands is depicted in the old plan of 1910 made in C. R. 4923. There is some evidence led by the plaintiff who tried to show that he and his co-owners used to possess the northern portion (except the coconut and rubber plantations) along with the contesting defendants. But even this will not help the plaintiff to establish that the two lands were in reality one land in the face of the clear evidence afforded by the old deeds, some of which were executed long prior to the first action instituted by Nonnehamy. It was she who first attempted to treat both lands as forming one entity, possibly with a view to claiming a share out of the divel portion which her brother Adirian alone had been leasing as owner of the entirety.

[1] *11 Exch 385.* [2] *55 Madras Law Weekly 511.*

At a late stage of the argument the plaintiff-respondent's counsel drew attention to the fact that Adirian, when he transferred in 1899 to Andiris, recited title to the divel portion by inheritance through his paternal grandfather. He argued from this that Adirian's sister Nonnehamy must therefore have been entitled to a share of this divel portion. But this does not meet the objection that there are two distinct portions ; nor does it help the plaintiff on the question of *res judicata*.

It is unnecessary for me to discuss the question whether the contesting defendants have established prescriptive title to the divel portion for they do not need to rely on a prescriptive title. Once it is found in their favour that the divel portion is a distinct land from the paraveni portion and that the plaintiff has no share in the divel portion, that portion must be excluded because the two portions cannot then be joined in one action for partition. It is not suggested that the plaintiff and/or the other parties to this action have prescribed against the contesting defendant in respect of this portion.

I would accordingly direct that the corpus to be partitioned be confined to lots A, B, C, and D in plan Z ; lots E, F, G, H, I, J, and K must be excluded from the scope of this action because the plaintiff owns no share in them, and the interlocutory decree will be varied by deleting the references to these lots. The plaintiff respondent must pay the 4th, 11th and 19th defendants-appellants their costs of the contest in the lower Court and of this appeal. The other costs will be in the discretion of the Judge who deals with the action in the lower Court.

FERNANDO A.J.—I agree.

Decree varied.