1909.
June 25.

Present: Mr. Justice Wendt and Mr. Justice Middleton.

MOHAMED CASSIM *v.* SINNE LEBBE MARICAR *et al.*

D. C., Galle, 8,254.

Res judicata—*Dismissal of action owing to want of cause of action—Second action—Civil Procedure Code, ss. 34, 207, and 406.*

A judgment dismissing an action for declaration of title to land on the ground that the plaint disclosed no valid cause of action does not operate as a bar to a second action for the same relief.

ACTION *rei vindicatio.* The plaintiff sought to vindicate his title to an undivided two-thirds share of house No. 44, Church street, in the Fort of Galle, alleging that the first defendant was in the forcible and unlawful possession of the same, denying and disputing the plaintiff's title to the same. The first defendant denied the plaintiff's title and also pleaded that the plaintiff's action was barred by reason of the decree in D. C., Galle, 5,265, dated July 3, 1899, dismissing an action brought for the whole of the premises by Sella Umma, a predecessor in title of the plaintiff, against first defendant.

The judgment in 5,265, which was pleaded as *res judicata*, was as follows :—" I am of opinion that the plaint discloses no valid cause of action against defendant, as plaintiff is still in possession of the house, and her possession is not disturbed. The case is dismissed." The decree entered was one of dismissal of the plaintiff's action.

The District Judge (K. W. Macleod, Esq.) upheld the plea of *res judicata* and dismissed the action.

In appeal,

Bawa, for the plaintiff, appellant.

Seneviratne (with him *H. A. Jayewardene*), for the first defendant, respondent.

Cur. adv. vult.

June 25, 1909. WENDT J.—

I have had the advantage of perusing my brother Middleton's judgment, with which I agree. As he has set out the facts, it is unnecessary that I should recapitulate them. The District Judge, in upholding the plea of *res judicata*, proceeded upon the authority of *Baban Appu v. Gunewardene*,[1] which, he said, he was unable to differentiate from the present case. There is, however, a fundamental distinction between the two cases. In *Baban Appu v. Gunewardene*[1] the decree pleaded in bar expressly declared Gunewardene the

[1] *(1907) 10 N. L. R. 167.*

owner of the land, and directed that Baban Appu be ejected from it. It was therefore held, and I venture to think rightly held, that Baban Appu could not again assert his own title to the land as he had done in his former action. In the present case the decree relied upon did not declare anybody's title, but on the face of it advisedly forbore to deal with the title at all. The dismissal of an action for land, even when it comprises no declaration of the defendant's title, may no doubt operate to make the title *res judicata* against the plaintiff, but that only occurs when the Court has dealt with the title, and decided that plaintiff had failed to establish his rights (I leave out of view the cases in which an action is dismissed *in toto* for default of plaintiff taking some necessary step, and which may perhaps constitute a bar under section 207, without the subject-matter of the action having been at all considered by the Court.

The decree in case No. 5,265 pleaded by the defendant in the present case no doubt dismisses the plaintiff's action. It has, of course, to be read with the pleadings and the judgment. The pleadings showed that plaintiff's title was altogether (or at least as to anything more than an undivided half of the property in question) denied by the defendant. The proceedings at the trial are not in evidence, but I shall assume that plaintiff's title continued in issue to the end. The Court, however, declined to adjudicate upon that title, because a condition precedent to its exercising jurisdiction over the title had not been fulfilled, that is to say, the establishment of a "cause of action," or reason for seeking the interference of the Court. Although not exactly on all fours, such a case is somewhat analogous to those in which the Court declines jurisdiction altogether, on the ground that the subject-matter is outside the territorial or pecuniary limits of its jurisdiction. It is beside the point to argue that it would at the present day be held, and that in deciding case No. 5,265 the District Judge ought to have held, that plaintiff had a good cause of action, and that plaintiff ought to have appealed and had the case sent back for trial and determination of his title. Suffice it that the Court held the other way. Plaintiff is entitled to accept that judgment as correct, and the only disability he incurred by his failure to appeal is that he is debarred from saying that, although in the full enjoyment of all he claimed, he yet had a cause of action at that date to obtain a declaration of his title.

I wish to add that the effect of section 207 and the connected sections of our Civil Procedure Code would appear to be to render it possible that the dismissal of an action may for ever bar the right asserted in it, although the Court has not expressly or by implication expressed any finding upon that right—*res adjudicata*, without any *adjudicatio* at all. An instance of this would be the dismissal for default of taking some step ordered by the Court. In India, however, the construction put upon section 13 of the Code of Civil Procedure of 1882 would seem to render such a result impossible.

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In this connection respondent cited to us the case of *Esan Appuhami v. Louis Appuhami*,[1] as to which I would say that I feel very great difficulty in holding that a plaintiff, whose title was expressly admitted by the defendant in his answer, would by the dismissal of his action for failure to add parties within the time appointed by the Court be for ever barred by section 207 from setting up that title as against the defendant.

I agree to the order proposed by my brother Middleton.

MIDDLETON J.—

This was an action to vindicate title to two-thirds share of a house, No. 44, Church street, Galle. The defendants denied the plaintiff's title, and pleaded, *inter alia*, that the plaintiff was estopped from bringing this action by reason of the decree in D. C., Galle, 5,265, dated July 3, 1899, which dismissed an action brought by the plaintiff's predecessor in title against the defendant in the present action praying a declaration of title to the same house. That action was dismissed by the District Judge on the ground that the plaint disclosed no valid cause of action against the defendant, as plaintiff was still in possession of the house, and her possession was not disturbed. The District Judge upheld this plea, and the plaintiff appealed.

Now, according to English Law, there are three kinds of estoppel: (1) by matter of record; (2) by deed; (3) in *pais* (*Stephen's Blackstone, Vol. I., p. 479, note*, and *Wharton's Law Lexicon*), and an estoppel means a conclusive admission which cannot be denied or controverted. Estoppel by record is also of two kinds: by judgment *in personam* and judgment *in rem*. The doctrine of estoppel by record or *res judicata* is founded, as Hukm Chand says (page 5), on the maxim *nemo debet bis vexari pro unâ et eadem causâ*, and exists, in my opinion, as a doctrine of the law long in force in Ceylon (see *Ramanathan 43–45, p. 35; Ramanathan 60–61, 62, p. 71; Ramanathan 72–76, p. 272*), quite independently of the amplifications of it which have been grafted upon it by the Legislature by section 34, the note of section 207, and section 406 of our Civil Procedure Code. By those amplifications a party may not only be estopped on the ground of *res adjudicata* by a decision on the rights, remedies, and relief he has actually claimed in an action, but also on the rights, remedies, and relief which he has omitted to claim or might have claimed upon the same cause of action in the former action, and may also be precluded by withdrawal from or abandonment of an action without leave from bringing a fresh action.

Now, I am not aware that these amplifications are in force under the English Common Law doctrine of estoppel by record, and I am inclined to think they were introduced into Ceylon for the purpose of restraining the inherent predisposition to litigation exhibited by

[1] (*1907*) *3 Bal. 236.*

its law-loving inhabitants. I also take leave to think that section 11, formerly section 13, of the Indian Civil Procedure Code does not go quite so far as our sections 207 and 34, although in explanation 4 it enacts that " any matter which might or ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

In *Ibrahim Baay et al. v. Abdul Rahim*[1] I enunciated what I deemed to be the essential facts which must be proved or admitted to constitute a valid estoppel by judgment *in personam* under English Law, and those facts were that the decision in the first case must be given by a court of competent jurisdiction, it must have been between the same parties or their privies, there must have been the same cause of action, the decision must have comprised a decision on the same question, and the question must have been directly in point in the former case. In my opinion these facts must exist in cases which are covered by the amplifications I have alluded to in section 34 and in the note to section 207, save and except that there is necessarily no finding on the same question, nor can it have been directly in point in the former action if it was not then raised. There must be, however, a court of competent jurisdiction, the same cause of action, and the same parties or their privies. The decision becomes an estoppel by *res adjudicata* as to rights and remedies the plaintiff might have raised or sought for, because he did not raise or seek for them when he might have done so.

The present case, in my opinion, does not come under the terms of either section 34 or the note to section 207. Here the Judge in the first case, No. 5,265, in effect said: " Assuming you have the right and title you allege, you have shown on the pleadings no interference with your rights to justify the action," apparently overlooking paragraph (13) of the plaintiff's plaint, which alleges a denial of plaintiff's rights quite sufficient under section 5 of the Code to justify the action. The finding, if any, on the question of title was in favour of the plaintiff, as the Judge acted on the assumption that she had the right she claimed. No question was raised as to the plaintiff here not being privy in estate to the plaintiff in the former action. I think, therefore, that the decision of the District Judge in No. 5,265 was not *res judicata* of the plaintiff's action in this case, and that he is therefore not estopped by it, but entitled to proceed with his action. The judgment of the District Judge must therefore be set aside with costs of appeal and the case sent back for trial in due course, the costs in the District Court to abide the event of the action.

Appeal allowed; case remitted.

[1] *(1909) 12 N. L. R. 177.*