1936 *Present :* **Moseley J. and Fernando A.J.**

AMEEN *v.* PATIMUTTU.

49 & 50—D. C. Colombo, 309.

Res adjudicata—*Action by plaintiff for accounting of rents collected by defendant as manager—Defendant's denial of his capacity as manager—Action dismissed of consent—Subsequent action for declaration of title—Plea of* res adjudicata—*How far it is valid in a decree of dismissal—Civil Procedure Code, s. 207.*

In D. C. Colombo, No. 29, the plaintiff sued her husband, the defendant, asking for an account of the rents received by the defendant as her manager from the properties in question and for a decalartion that she was entitled to certain premises which had been purchased by the defendant out of the rents collected by him.

The defendant in his answer denied that he collected the rents as manager of the plaintiff. He further alleged that it was agreed that the defendant should take the rents for himself and that the rents were in fact applied to the maintenance and support of the plaintiff and her children.

The action was dismissed of consent, the plaintiff and defendant having settled their differences. The plaintiff brought the present actions in which she asked for declaration of title to the same properties and for damages for wrongful possession.

***Held,* that the actions were not barred by the decree of dismissal entered in the previous action.**

Where an action is dismissed of consent, the decree of dismissal can operate as *res adjudicata* only where there is no legitimate doubt as to the issues which were involved in the decision on the facts which have been expressly or impliedly decided thereby.

IN these actions the plaintiff sued her husband for declaration of title to certain premises for damages, for wrongful possession, and for ejectment. The actions were tried together. The defendant *inter alia* pleaded that he had effected certain improvements to the premises and claimed compensation for them. He further pleaded that the order made in D. C. Colombo No. 26 was a bar to these actions. In the latter case plaintiff had asked for an account of the rents recovered by the defendant as her manager from the properties in question and for a declaration that she was entitled to certain premises which the defendant had bought out of the rents collected by him. The action was dismissed of consent, the parties having settled their differences. The learned District Judge held that the decree of dismissal was not *res adjudicata.*

H. V. Perera (with him *N. E. Weerasooria, L. A. Rajapakse, E. F. N. Gratiaen,* and *J. A. T. Perera*), for defendant, appellant.—A consent decree operates as *res judicata.* (*Dingiri Menike v. Punchi Mahatmaya*[1]; *Sinniah v. Elliakutty*[2]) One must look at the pleadings to find out the point in issue. The right claimed by the defendant in this case is the same right claimed in the previous case, *i.e.,* the right to collect the rents. The dismissal of the plaintiff's action is a bar to the denial of that claim. The fact that the earlier action was between husband and wife does not affect the question of *res judicata.* As long as the decree is not set aside it is *res judicata* (*18 N. L. R. 510*). *Res judicata* operates not merely with regard to the subject-matter of the action but the grounds on which a person asks for relief. The grounds of settlement can be inferred. The expression "cause of action" is used in section 207 of the Code in the wider sense, *i.e.,* the grounds on which the plaintiff asks for relief. No distinction is drawn between a decree of consent and without trial and a decree after trial. The section says "same cause", not "same cause of action". The former word has a wider significance (*16 N. L. R. 257*). Pereira J's. view has been adopted in later cases (*Loku Banda v. Piyadassa*[3]). This is in accordance with the general principles of *res judicata.* (*Hukum Chand, p. 10, article 9.*) The right claimed in this case is a usufruct and may be acquired by prescription (*Arunasalam Chetty v. Bilinda*[4]). The defendant collected the rents in his own right and did not account to his wife for them.

N. Nadarajah (with him *E. B. Wikramanayake, Marikar,* and *Senaratne*), for plaintiff, respondent.—The sections applicable are 406 to 408 where an action is dismissed on a consent motion. This is not

[1] *13 N. L. R. 59.*
[2] *34 N. L. R. 37.*
[3] *4 C. W R. 155.*
[4] *24 N. L. R. 311.*

res judicata. (*Spencer Bower, ss. 33 and 34; Hukum Chand, p. 125, s. 58*). Mere consent decree does not operate as *res judicata* unless the Court has brought its mind to bear on the question (*Jenkins v. Robertson*[1], *Gonchie v. Clayton*[2]). Only the prohibitory or mandatory part of the decree is binding. The dismissal of plaintiff's action would bar another action on the same cause of action but is not *res judicata.* Where a case can be decided on one issue the findings on other issues will not be *res judicata* (*Appuhamy v. Punchihamy*[3]). Parties must advert to the point in issue and settle it (*A. I. R. (1934) Madras 454*). There is no decree of non suit now. The Code has substituted sections 207 and 408. In the case of a compromise the Court acts under section 408. The case in *Sinniah v. Elliakutty* (*supra*) can be distinguished. In that case the plaintiff admitted defendant's title to the lot in question. An admission is sufficient for a Judge to come to a decision. In the previous case the burden was on the defendant to prove his prescriptive title to the usufruct. Can it be said that the dismissal of plaintiff's action was an admission of his claim. (*14 N. L. R. 342; Ord. v. Ord. (1912) 2 K.B. 432, at 439.*) There is no evidence of prescriptive possession of usufruct. Possession by the husband is presumed to be possession by the wife (*Ram Dass v. Kishon Guptas*[4]). Possession must be proved to be adverse. Mere possession is not enough (*Nagudu Marikar v. Mohamadu*[5]).

H. V. Perera, in reply.

November 6, 1936. FERNANDO A.J.—

These are two actions between the plaintiff-respondent and the defendant-appellant, who are husband and wife. In D. C. Colombo No. 309, the plaintiff prayed for a declaration of title to premises Nos. 114-118, Bankshall street, No. 91, Maliban street, and 226, New Moor street. In D. C. Colombo No. 329, the plaintiff prayed for declaration of title to premises No. 33, Second Gabos lane, No. 7, Cross street, No. 28, Fishers lane, and another premises in New Moor street. In addition to the prayer for declaration of title, she also asked for damages on the footing that the defendant had been in wrongful possession of these premises and for ejectment. Both cases were fixed for trial on January 16, 1936, and on that date it was agreed that both actions be tried together. The two cases were accordingly tried together and one judgment has been delivered from which the defendant appeals to this Court.

The defendant set up various defences to the plaintiff's claim and further pleaded that he had effected certain improvements to the premises from time to time and claimed compensation for the expenses so incurred by him, and he also prayed for restitution of conjugal rights as between him and the plaintiff. At the beginning of the trial, the learned District Judge thought that the question of the restitution of conjugal rights could not conveniently be dealt with in these proceedings, and gave leave to the defendant to pray for such relief in another action.

Certain issues were then framed and the learned District Judge held that the plaintiff had given notice to the defendant on February 2, 1934,

[1] *1 H. L. (Scotch App.) 117 at 122.*
[2] *11 L. T. 732.*
[3] *17 N. L. R. 271.*
[4] *24 W. R. 274.*
[5] *7 N. L. R. 91.*

that he was no longer to collect the rents of the properties in question, that the plaintiff was entitled to a sum of Rs. 9,200 as rents of the said properties, that the defendant was collecting the rents at the request either implied or expressed of the plaintiff, and that the defendant was not entitled to any compensation. He also held that at the marriage of the parties there was no agreement by which the right to possess the premises was given to the defendant, that the defendant was not entitled to the rents in question, and that the order made in D. C. Colombo, No. 26, was no bar to the present action and did not operate as *res judicata.*

Counsel for the appellant argued before us that the decree in that action was *res judicata,* and he also argued that defendant had been in possession in pursuance of his right to the rents on the agreement alleged by him, and that he had acquired a right to those rents by prescriptive possession. He also argued that it was proved in the case that improvements had been effected by the defendant, and that these improvements had not in fact been assessed by the learned District Judge.

The most important question that was argued before us was the question of *res judicata.* It would appear from the proceedings in D. C. Colombo, No. 26 (D 1), that the plaintiff in this action asked for an account of the rents recovered by the defendant as her manager from the properties in question from July 1, 1928, to January 31, 1934, for an order on the defendant to pay such amount to the plaintiff, and for a declaration that she was entitled to premises called "Donnington" which she said had been purchased by the defendant out of the rents collected by him. The defendant in his answer D 2 denied that he collected the rents as manager of the plaintiff, or that he was under any obligation to render an account. He further alleged that it was agreed that the defendant should take the rents for himself, that plaintiff had acquiesced in his appropriation of the rents, and that the rents were in fact applied to the maintenance and support of the plaintiff and her children and in household expenses. The decree D 4 ordered that the action of the plaintiff be dismissed, each party to bear his own costs, and it would appear from the evidence that this decree was entered of consent, the plaintiff and the defendant having themselves settled their differences.

Now on the question of *res judicata* there is no distinction between the law of Ceylon and that of England, and the provisions of sections 34, 207, and 406 of the Civil Procedure Code are not exhaustive and may be supplemented by the English law. (See *Samitchyappu v. Perera*[1].) Section 34 provides that every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the *cause of action.* and if a plaintiff omits to sue in respect of, or relinquishes any portion of, his claim he shall not afterwards sue in respect of the portion so omitted or relinquished. Section 207 provides that all decrees passed by the Court shall, subject to appeal, be final between the parties. The explanation to that section provides that every right of property, or to money, or to damages, or to relief of any kind which can be claimed or put in issue between the parties upon the cause of action for which the action is brought, whether it be actually so claimed, put in issue, or not, becomes on the passing of the decree a *res adjudicata;* and section

[1] *3 C. A. C. 30.*

406 provides that a plaintiff may be allowed to withdraw from an action with liberty to bring a fresh action for the subject-matter of the action.

As far as this plea of *res judicata* is concerned, the real question is whether a plaintiff, whose action is dismissed as the result of a settlement between the parties, is barred from bringing a subsequent action for anything other than the relief actually claimed in the action. This Court has held that a judgment entered of consent between the parties, or as the result of a decisory oath, will operate as *res judicata* as much as any judgment entered as the result of an adjudication by the Court (see *Dingiri Menika v. Punchi Mahatmaya*[1]), and Spencer Bower in his treatise on *Res Judicata* at page 23 sets out the English law as follows:—"Any judgment or order which in other respects answers to the description of *res judicata* is none the less so because it was made in pursuance of the consent and agreement of the parties. It is true that in such cases the Court is discharged from the duty of investigating the matters in controversy and does not pronounce a judicial opinion upon any of such matters; but it is none the less true also that at the joint request of the parties the tribunal gives judicial sanction to what those parties have settled between themselves, and in that way converts a mere agreement into a judicial decision on which a plea of *res judicata* may be founded. . . . But though consent judgments and orders are undoubtedly decisions in the sense that the actual mandatory or prohibitive parts of the judgment is conclusively binding, it may often be a matter of legitimate doubt as to what, if any, particular questions or issues were expressly or impliedly the subject of the consent, and of the decision. For this purpose the Court will closely examine all such evidence, if any, as is available and admissible. Any issue or question which is thus shown to have been recognized or taken by the parties as the subject of the litigation, and of the judgment or order agreed to, is deemed to have been thereby conclusively determined so as to preclude any subsequent challenge. Where however there are no such materials available as are above indicated, there is nothing which can operate as a decision of any particular question or issue, and neither party is estopped from disputing anything but the actual judgment or order itself." Continuing at pages 28 *et seq.* he states that, "When an action is dismissed by a judicial tribunal after a trial or hearing, it is often a question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. The answer to this inquiry depends upon whether on reference to the record and such other material as may properly be resorted to, the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of fact or law, in which case there is an adjudication on that question or issue; if otherwise the dismissal decides nothing. except that in fact the party has been refused the relief which he sought . . . ." "The dismissal of an action," he says, at page 30, "which can only succeed on establishing either fact x or y may involve a decision negativing both of these facts; but if the action is founded on x plus y, its dismissal does not, of necessity, carry with it a decision as to either x or y, since the action, for aught that appears from the dismissal

[1] *13 N. L. R. 59.*

itself, may have failed, because fact *x* had not been established, though fact *y* had been, or *vice versa,* or because neither fact had been established : and the dismissal therefore in such circumstances does not preclude the unsuccessful plaintiff from suing again, in another form of action, for the success of which proof of *x* only, or of *y* only, is sufficient."

Spencer Bower in support of these propositions cites the case of *In re Allsop* and *Joy's Contract. 61 Law Times 213,* where Chitty J. said, "The estoppel is not of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Much less therefore is either side estopped by the reasons which the Judge assigns for the conclusion that he comes to. It is the conclusion that constitutes the estoppel. Now after what I have said, it is plain that this bill might have been dismissed on either of the two grounds. It might have been dimisssed on the ground that the plaintiff already had the legal estate, or on the other ground that he had not the equitable estate in fee simple. I am not at liberty, nor in my opinion would any Court hereafter be at liberty, to adopt either one of these propositions as the ground and say, 'it is this and not that'." He then proceeds to cite the judgment of Lord Herschell in *Concha v. Concha*[1] to the effect that "an estoppel is an estoppel only so far as regards all matters necessary to be decided in the suit". The law in India appears to be the same (see *Hukum Chand on Res Judicata, p. 129 et seq.*

Our law being the same as the law in England, it seems to me that in interpreting section 207 of the Code, we have to bear in mind these principles of the English law as to *res judicata* which are also applicable in Ceylon and that the words "all decrees passed by the Court" must mean all decrees which give expression to a judicial decision as well as all decrees entered of consent, where there is no legitimate doubt as to the issues which were involved in the decision, or the facts which have impliedly or expressly been decided thereby. The learned District Judge sets out the circumstances in which the motions in D. C. Colombo, No. 769, were drawn up and he states that there was a suggestion by the Judge before whom these cases came up, that the plaintiff and defendant (wife and husband) should get reconciled and adjust their differences. The parties met in a vacant house or room and the motions were drawn up as the result of the interview, although the plaintiff's proctor did not in fact approve of the settlement. We are only concerned, however, with the decree in D.C. Colombo, No. 26 (D4), and if the position I have set out above is correct then that decree itself as well as the pleadings in the case must be examined in order to ascertain what the subject of litigation was, and what issue or issues, if any, must be considered as having been determined by that decree. In the plaint D 1 the plaintiff set out that at the time of her marriage she was entitled to certain premises, and that the defendant after the marriage took over the management of the properties and collected the rents and profits thereof from about February, 1925, to the end of January, 1934. She then pleaded in paragraph 4 that the defendant informed the plaintiff that he would collect the rents and later buy a house in the name of the plaintiff, and that in accordance with this arrangement a house was purchased, but the plaintiff later discovered that the house

[1] *11 A. C. 541.*

had been purchased in the defendant's name, and not in the name of the plaintiff ; she therefore claimed the sum of Rs. 25,000 which had been paid for the property, or in the alternative a declaration that the defendant holds the property in trust for her. She further pleaded that the defendant had failed to render an account for the moneys collected by him, and prayed that judgment be entered in her favour for a sum of Rs. 20,000 as money in his hands. In his answer D 2, the defendant denied that he took over the management of the properties, or that he received the rents as such manager on behalf of the plaintiff. He also denied the arrangement with regard to the purchase of the house in question, and he pleaded that he purchased the same with his own money. He then went on to plead that he was under no obligation to render an account to the plaintiff, and that he had collected the rents in accordance with an arrangement made at the time of the marriage of the plaintiff, that the plaintiff herself had acquiesced in his collection and appropriation of the rents, and had never claimed the said rents. He further pleaded that the nett amount of the rents had been expended in the maintenance and support of the plaintiff and of her children. Now it is obvious that certain questions would arise from these pleadings. The defendant had admitted that plaintiff was the owner of the premises in question, but had denied taking over the management, so that in order to succeed in her claim for an account, the plaintiff had to prove that defendant was her manager. If she failed to prove the management she might still succeed in her claim with regard to the property purchased by the defendant if she proved that nevertheless, the rents were her own property and that the defendant had actually purchased the property with the money recovered by him as rent. The question would also arise, whether the defendant had collected the rents by his own right and whether he had acquired that right as the result of an agreement between himself and the plaintiff, and also whether or not the purchase had been with the money so collected or with other moneys belonging to the defendant. Then there was the question of compensation claimed by the defendant for improvements effected to the property, as to which, it may have been possible to frame an issue in view of paragraph 5 of the answer, so that it is clear that there were a number of issues which would arise on the pleadings. Can the dismissal of the action in these circumstances involve a decision on all these issues ? It seems to me that considering the circumstances in which that action was dismissed and the terms of the decree, the dismissal of that action will not preclude the unsuccessful plaintiff from suing again in another form of action, where she might only prove one or more of the facts on which the previous action was based. I would accordingly hold that that decree is not a bar to the present action.

In the case of *Appuhamy v. Punchihamy* [1], Lascelles C.J. held that in a case where there are two findings of fact, either of which would justify the decree which was entered, the finding which can operate as *res judicata* would be the finding which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of the two findings unnecessary. As de Sampayo J. puts it, "it is well settled that for the purposes of *res judicata* the issue must be a

[1] *17 N. L. R. 271.*

substantial and not a mere incidental issue", and he sets out what he thought was quite clearly the principal and substantial issue in the earlier action. In this decision the Judges followed the Indian case of *Shib Charan Lal v. Ragu Nath*[1]. Apparently the principles set out by Spencer Bower, at page 30 as applicable in England have not been adopted in India. Even if the principle laid down in *Appuhamy v. Punchihamy* (*supra*) is applicable to this case in spite of the circumstances that there was no trial and the action was dismissed as the result of a settlement, the defendant can only rely as *res judicata* on the implied decision of the substantial issue in the previous action and it would appear that the substantial issue in that case was whether the defendant had in fact collected the rents as manager of the plaintiff. With regard to any other issues that were directly or indirectly involved in that action, the decree dismissing the plaintiff's action would not be *res judicata*. It follows, therefore, that that plea must fail and that issue 8 must be answered in favour of the plaintiff.

On the rest of the case, I see no reason to interfere with the finding of the learned District Judge on issues 1, 2, 3, 4, 5, and 6. With regard to issue 7 *a*, *b*, and *c*, the learned District Judge held that the defendant was not entitled to compensation for the improvements effected to the premises. The evidence led for the defendant was, as the learned District Judge found, extremely unsatisfactory and the defendant himself was not able to produce any accounts of the money spent by him. The premises to which the improvements were effected admittedly belonged to the plaintiff, and it follows from the findings on issues 3, 4, 5, and 6 that the moneys recovered by the defendant as rent were moneys belonging to the plaintiff. If the defendant in his capacity as husband utilized a part of the money in effecting improvements to the premises from which he was collecting rent, I do not think he can claim to recover the money from the plaintiff. I see no reason, therefore to interfere with the finding of the learned District Judge on these issues, and I would affirm the decrees of the District Court, and dismiss these appeals with costs.

MOSELEY J.—I agree.

Appeal dismissed.