

1951

Present: Gratiaen J. and Pulle J.

NADARAJAH, Appellant, and PATHTHAKUDDY, Respondent

S. C. 139 Inty—D. C. Trincomalee, 3,387

Res judicata—Claim and counter-claim—Compromise—Right of defendant to bring fresh action in respect of the counter-claim—Civil Procedure Code, ss. 207, 408.

Where, in an action, a counter-claim made by the defendant is in substantial issue but, subsequently, a judgment by consent is entered in full satisfaction of the claim and without any reservation of the defendant's right to bring a separate action in respect of the counter-claim, the defendant is precluded from bringing a second action in respect of the counter-claim. If he does so, the consent decree in the previous action will operate as *res judicata*.

APPEAL from an order of the District Court, Trincomalee.

H. W. Tambiah, with G. F. Sethukavalar, for the defendant appellant.

E. R. S. R. Coomaraswamy, for the plaintiff respondent.

Cur. adv. vult.

May 30, 1951. PULLE J.—

The plaintiff in this action alleged that the defendant cultivated a paddy field in the year 1945 undertaking to deliver ten amunams of paddy. It was also alleged that the defendant cultivated the same field in 1946 and became liable to deliver ten amunams of paddy in that year as well. In the result the plaintiff claimed to be paid Rs. 2,000 being the value of twenty amunams at the rate of Rs. 100 per amunam. Various defences were raised by the defendant of which one was that the decree in an earlier case between the same parties, namely, D. C., Trincomalee, Case No. 3,224, operated as *res judicata*. This plea was taken up as a preliminary issue and was decided against the defendant.

In Case No. 3,224 the defendant in the present action sued the plaintiff on a mortgage bond dated 2nd November, 1939, for the recovery of a sum of Rs. 1,509 and interest and prayed that the land mortgaged be decreed bound and executable. As against this claim the plaintiff pleaded that he had paid a sum of Rs. 500 in part settlement of the amount due on the bond and further alleged that the defendant had the use and occupation of the field in question during the years 1945 and 1946 promising to deliver to the plaintiff ten amunams of paddy per year as ground share. The defence then was that as against the claim on the bond the plaintiff was entitled to credit to the extent of Rs. 500 paid in cash and the value of twenty amunams of paddy at Rs. 100 per amunam. The present plaintiff's prayer in that case was that an account be taken of the transactions between the parties to the bond and that the defendant be "adjudged and decreed to pay such sum of money as may be found due to him on such accounting". In substance the plaintiff's defence to the

action on the mortgage bond was that the claim arising on it had been paid and settled and that, if on an accounting, a sum was found due to him, a decree in his favour for that sum should be entered.

To decide the plea of *res judicata* it is necessary to read the issues which were framed at the trial in Case No. 3,224. They are as follows:—

- (1) What sum is due to the plaintiff on the bond sued upon ?
- (2) Did the plaintiff cultivate the defendant's field of nine acres in 1945 and 1946 ?
- (3) If so, what is a reasonable rental for that field ?

The defendant gave evidence stating that the plaintiff had borrowed Rs. 1,000 on the 2nd November, 1939, agreeing to pay interest at 12 per cent. He admitted having received Rs. 200 in 1941 and Rs. 300 in 1942 on account of principal and interest. He claimed Rs. 820 as principal and Rs. 689 as interest making a total of Rs. 1,509. At this point of the evidence the case was settled and the settlement was recorded in the following terms:—

“ Of consent judgment for plaintiff for Rs. 1,500 in full satisfaction of the claim. No costs. Order to sell not to issue for two years from to-day ”.

The learned District Judge rejected the proposition put forward by the appellant that when parties settle a case all matters that were in issue between them become *res judicata*. He was of the opinion that the terms of section 408 of the Civil Procedure Code were against the appellant. He emphasized that a decree entered upon a compromise was final only in so far as it relates to “ so much of the subject-matter of the action as is dealt with by the agreement, compromise or satisfaction ”. According to him the subject-matter of Case No. 3,224 was the debt due on the mortgage bond and that the amount claimed by the defendant in that case was neither the subject-matter of that case nor any part of the cause of action for which that case was instituted. He thought that even apart from section 408 parties did no more than settle the claim on the bond leaving at large the claim involved in the defence set up against the appellant. With due deference to the opinion expressed by the learned District Judge I am unable to agree with him.

In the case of *Sinniah v. Eliakutty*¹ it was laid down that a judgment by consent is as effective by way of estoppel as a judgment whereby the Court exercised its mind in a contested case and has the full effect of a *res judicata* between the parties. In *re South American and Mexican Co.*,² Lord Herschell said:

“ The truth is a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action ”.

¹ (1932) 34 N. L. R. 37.

² (1895) 1 Ch. 37, 50.

It is undoubtedly true as laid down in *Appuhamy v. Punchihamy*¹ that the issue for the purposes of *res judicata* must be a substantial and not a mere incidental issue and that where an action has been settled the decree embodying the settlement can operate as *res judicata* only "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". *Ameen v. Patimuttu*². Applying these tests there is no room for doubting that the counter claim of the plaintiff-respondent in Case No. 3,224 became a substantial issue for, if it had succeeded, the appellant would have failed in that action and perhaps would have been ordered to pay a sum of money to the plaintiff. It seems to me that the learned District Judge has placed a narrow construction on the phrase, "subject matter of the action", in section 408 of the Code. When a claim is made in a legal proceeding and a defence has been delivered and the case set down for trial for the purposes of the final adjudication matters of defence become as much the subject matter of the action as the claim itself. Had the defence in Case No. 3,224 been *simpliciter* that the claim on the bond had been discharged by the appropriation by the appellant of a quantity of paddy equivalent to the claim and had a compromise been effected in the same terms as in this case the plea of *res judicata* could not possibly have been contested. I do not think that it makes any difference that the plaintiff alleged that the paddy appropriated exceeded even the claim. It has to be remembered in this connexion that it was open to the plaintiff in coming to a settlement to have reserved his rights to institute a separate action for the recovery of the whole or a part of the value of paddy appropriated by the appellant.

Reliance was placed by learned counsel for the respondent on the cases of *Mahalinga Sundarathevan v. Krishna Thevan and others*³ and *Ishri Prasad v. Mungra Lal*⁴. In the former case the following test laid down in *Rajah Kumaru Venkata Perumal Raja Bahadur v. Thutha Ramasamy Chetty*⁵ was applied: "What then is the test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise? In our opinion the answer must depend on the answer to the question 'Did the parties decide for themselves the particular matter in dispute by the compromise, and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree?' For settling this point it would be legitimate, and sometimes necessary, to look into the pleadings between the parties in the suit terminated by the compromise decree. . . . What the Court has to do in determining with respect to what matter each of the parties to a compromise decree is estopped, is to find out what it was the parties agreed to in the previous action; and for this purpose it would not be enough merely to see what was the relief granted in the decree of the Court, but it would be necessary also to examine what was the basis on which it was granted". Learned counsel for the respondent very properly drew our attention to the decree in Case No. 3,224 in which

¹ (1914) 17 N. L. R. 271.² (1936) 38 N. L. R. 264.³ (1916) A. I. R. Madras 411.⁴ (1930) A. I. R. Allahabad 619.⁵ (1912) 35 Madras 75.

there is no mention of the counter claim made by the plaintiff in the present case. It is a mortgage decree in the ordinary form for the recovery of Rs. 1,500. Applying the tests laid down in the case cited, when one has regard to not merely the pleadings in the suit but to the issues formulated for the trial of the matters in dispute, one is forced to the conclusion that though the counter claim was not expressly mentioned in the decree its disallowance was necessarily involved in the award of a decree for Rs. 1,500 in favour of the appellant.

In the Allahabad case which was cited an action was instituted for the recovery of a parcel of land described as lot 421. A plea of *res judicata* was raised on the ground that in a previous suit the plaintiff asked for a decree for the possession of one lot 419 and an injunction in respect of lots 415 and 421. The action was compromised by a decree which dismissed the claim for possession of lot 419 and allowed the injunction in respect of lot 415. Nothing was said about lot 421. The plea failed for the obvious reason that the cause of action in the later suit for possession was fundamentally different from the claim for an injunction. There were other reasons stated in the judgment. It is not necessary to advert to them as I am unable to extract from them any principle which would assist the contention on behalf of the plaintiff respondent. The plaintiff's alleged right to be paid the value of 20 amunams of paddy was specifically put in issue in Case No. 3,224 upon the cause of action on the mortgage bond and in terms of section 207 of the Civil Procedure Code the decree in that case operates as *res judicata*.

I would allow the appeal and dismiss the plaintiff's action with costs here and below.

GRATIAEN J.—I agree.

Appeal allowed
