1937

Present : **Soertsz J. and Fernando A.J.**

APPUHAMY *v.* MUDIYANSE *et al.*

194—D. C. (Inty.) Nuwara Eliya.

Lis alibi pendens—*Actions under section 247 of the Civil Procedure Code pending—Subsequent action* rei vindicatio *against same defendant—Section 247 actions withdrawn—Right to maintain action* rei vindicatio.

In two actions Nos. 11,980 and 11,979 of the Court of Requests, Nuwara Eliya, the present first plaintiff and the present second plaintiff respectively sued under section 247 of the Civil Procedure Code one Ramanathan Chetty, who had seized this land on a writ against the present defendant, to have it declared that it was not liable to seizure under that writ and they made the present defendant a party alleging that he was in wrongful possession of their shares of land and praying that they be declared entitled to those shares and that the defendant be ejected therefrom.

While those actions were pending the plaintiffs instituted the present action *rei vindicatio* in respect of the same land. On May 8, 1936, the defendant filed answer pleading that the plaintiffs were barred from maintaining the action in view of the cases pending in the Courts of Requests. On May 12, 1936, the plaintiffs' proctor moved in the Courts of Requests cases to withdraw them as against the present defendant, and to be allowed to bring a *rei vindicatio* action.

These motions were allowed, the proctor for defendant reserving any objection he may have " to the connected District Court case ".

Held, that the plaintiffs were not barred from maintaining the present action.

Annamalay Chetty v. Thornhill (34 N. L. R. 381) referred to.

IN C. R. Nuwara Eliya, 11,980, the first plaintiff sued the present defendant and one Ramanathan Chetty to have it declared that a certain land was not liable to be seized under a writ against the defendant. The second plaintiff had instituted a similar action, C. R. Nuwara Eliya, 11,979, against the defendants. While those actions were pending, the two plaintiffs instituted a *rei vindicatio* action in respect of the same land on February 8, 1937. The defendants filed answer on May 8, 1937, pleading *inter alia* that the plaintiffs were barred from maintaining the present action in view of the Court of Requests' cases. Thereafter the plaintiff's proctor moved in the Court of Requests' cases to withdraw them as against the present defendant and to be allowed to bring a *rei vindicatio* action. These motions were allowed, the Court minuting that the proctor for the defendant " reserves any objection he may have

for the connected District Court case ". On the date of trial various issues of law were framed. The learned District Judge held in favour of the plaintiffs and the defendant appeals from that order.

H. V. Perera (with him *N. Gratiaen*), for the defendant, appellant.—Under the Civil Procedure Code, 1889, only one action could be brought. The plaintiff in that action must go on with his case. If there are two actions the second cannot have a better fate than the first.

[SOERTSZ J.—What is the position if he withdrew the action because he had instituted another action ?]

Section 406 gives the conditions under which an action may be withdrawn. If no permission is granted, the plaintiff has to pay costs and he cannot bring a further action. (*S. P. A. Annamalay Chetty v. Thornhill* [1].) There the learned Judges say that a judgment-debtor need not be a party to a 247 action. The plaints in the Court of Requests' cases show that they were not merely 247 actions. Further, if the cases had been withdrawn without liberty to bring another action, then this action is barred.

This action is not an action subsequent to the Court of Requests' actions, but one instituted before the withdrawal. The permission to withdraw an action does not cover a case which has been instituted before. (*Shidramappu Muttappa v. Mallappu Ramachandappa* [2].) The second must fall within the permission granted.

The Privy Council held that two actions could be brought, but one action should be stayed and generally the latter one.

[SOERTSZ J.—Suppose the first action failed on the ground of registration, cannot the second action go on ?]

That stage was reached in the *Annamalay Chetty v. Thornhill* [3].

There is no non-suit to-day. We have to consider the legal effect and not the words used. Section 207 says that a plaintiff should not be non-suited.

The provisions of section 406 are nugatory if a person is allowed to file a plaint when there is already a plaint filed with an irregularity and this latter is withdrawn after the filing of the former.

[FERNANDO A.J.—Would it not come within the maxim *nemo debet bis vexari.*]

Yes, it does.

M. J. Molligoda (with him *P. A. Senaratne*), for the plaintiff, respondent.—The appellant contends that the causes of action are identical, but the Court of Requests' cases were the result of claim inquiries. In such cases the judgment-debtor need not be a party. No decree can be entered against him. (*Muppurala v. Siddaram* [4].)

[FERNANDO A.J.—The case *Sinnatamby v. Ramanathan* [5] is against you.]

But *Kuda Banda v. Dingiri Amma* [6] is in my favour.

The judgment-debtor is not affected by the first action. In the Court of Requests' cases the action against the second defendant only was withdrawn. (*Fernando v. Ismail* [7].)

The present action was a *rei vindicatio* one.

[1] *(1931) 33 N. L. R. 41*
[2] *(1930) 1 L. R. 55 Bom. 207.*
[3] *(1932) 34 N. L. R. 381.*
[4] *(1904) 4 Tam. 56.*
[5] *(1905) 2 Bal. 38.*
[6] *(1911) 14 N. L. R. 145 at 146.*
[7] *(1927) 36 N. L. R .447.*

H. V. Perera, in reply.—There was a claim against the judgment-debtor in the Court of Requests. If a decree had been entered against him, this action could not have been brought.

Cur. adv. vult.

June 14, 1937. SOERTSZ J.—

In this action the plaintiffs sought to be declared the owners of the land referred to in the schedule to the plaint, and they alleged that the defendant is in forcible possession of it from July, 1935. In his answer, before dealing with the merits, the defendant contended as a matter of law that the plaintiffs could "not have and maintain this action, the cause of action referred to being already the subject-matter of two actions Nos. 11,979 and 11,980 of the Court of Requests of Nuwara Eliya". In case No. 11,979, the present second plaintiff and in case No. 11,980 the present first plaintiff sued under section 247 of the Civil Procedure Code, one Ramanathan Chetty who had seized this land on a writ against the present defendant, to have it declared that it was not liable to seizure under that writ, and they made the present defendant, a party alleging that he was in wrongful possession of their shares of the land and praying that they be declared entitled to those shares, and that the present defendant be ejected therefrom.

This answer was filed on May 8, 1936. On May 12, 1936, the plaintiffs' Proctor submitted motions in the two Courts of Requests' cases, asking to be allowed to withdraw those cases as against the present defendant only, and to be given permission to institute a *rei vindicatio* action against him. These motions were allowed on May 15, and the Commissioner made a journal entry that "Mr. Modder reserves any objection he may have for the connected District Court case".

The present case came up for trial on September 11, 1936, and on that day seven issues of fact and four issues of law were framed and the case was adjourned for September 30, 1936. On that day the issues of law were discussed, and on October 16, 1936, the District Judge delivered his order in favour of the plaintiff. The present appeal is from that order.

The issues were these :—

1. Can plaintiffs maintain this action, the same having been instituted during the pendency of 11,979 and 11,980 ?

2. Plaintiffs' claims 81 and 88 having been dismissed, was their only remedy an action under section 247 of the Civil Procedure Code ? If so, is the present action maintainable ?

3. Was permission granted by the Court to withdraw C. R. 11,979 and 11,980 with permission to institute the present action ? Even if such permission was granted is that permission of any avail in law to the plaintiffs ?

4. Plaintiffs having withdrawn C. R. 11,979 and 11,980 against the defendant, is he precluded thereafter from maintaining the present action against them ?

I did not understand counsel for the appellant to press the point raised in issue No. 2. The question raised in that issue does not arise between the plaintiffs and this defendant. His contention was that once an action is instituted it must be proceeded with till a decision is obtained, unless

it is allowed to be withdrawn under section 406 of the Civil Procedure Code with liberty to institute a fresh action, or unless it abates. In any of those events, there is a termination of the action. In this instance the plaintiffs were allowed to withdraw the two C. R. cases with liberty to institute a *rei vindicatio* action ; that this must be understood to be the institution of a fresh action and not the bringing forward of an action that had been instituted three months before permission to withdraw the two Court of Requests' cases as against the present defendant was granted. He also contended that the institution of the present case in February, 1936, was of no legal consequence because there were already pending two cases involving the subject-matter of the present case. It had no significance except that it encumbered the roll.

So far as Courts in Ceylon are concerned there is the highest possible authority to support the view that the fact that one action is pending in respect of a cause of action is no bar to the institution of another action in respect of that same cause of action. That was exactly what happened in *S. P. A. Annamalay Chetty v. Thornhill*[1] and Lord Thankerton in delivering the opinion of the Judicial Committee of the Privy Council held that even a decree in one action from which an appeal was pending was no bar to a second action, for " it is open to the Court to see that the appellant does not get decree twice over for the same sum ". If, therefore, a decree in one case so long as it is under appeal, cannot support a plea of *res judicata* against a second action on the same cause of action, it necessarily follows that the fact that an action is pending already will not bar another action being instituted on the same cause of action. In regard to this question of *lis alibi pendens* I find Spencer Bower in his treatise on *res judicata* summarizing the cases cited by him on the point as follows (see page 213) :—" The practice of the Courts in dealing with a *lis alibi pendens* is governed by the same considerations of public policy as those which lie at the root of the doctrine of *res judicata.* In both cases alike, our Jurisprudence is actuated by the principle *nemo debet bis vexari pro una et eadem causa* though of course, the theory of merger—transit in *rem judicatam*—has no application to questions of *lis alibi pendens.* Pending litigation, *ex vi termini,* excludes the idea of its termination by judicial decision, but since concurrent proceedings on the same question, or with the same object may occasion a *bis vexatio* hardly less oppressive than a proceeding which seeks to reagitate a question determined by a former judicial decision, the Courts . . . . have always exercised their inherent discretionary jurisdiction to prevent abuses of the technical right of a party to litigate before different tribunals at one and the same time if that jurisdiction is invoked at a reasonably early stage, but not otherwise ". Mr. Perera, however, argued that the position in Ceylon is different in view of section 33, 34, and 406 of the Civil Procedure Code. In another stage of the case *Annamalay Chetty v. Thornhill* Justice Garvin summarizes a similar argument by Mr. Perera in these terms[2] : " Counsel frankly admitted that if the question were to be determined by the general rules of the law *res judicata* his objection would not be sustainable. But he contends that there in Ceylon we have a statutory rule in accordance with which upon the entry of a decree dismissing a

[1] *(1931) 33 N. L. R. 41.* [2] *(1932) 34 N. L. R. 381 at p. 385*

plaintiff's action no matter upon what ground—except for want of jurisdiction—every right claimed or claimable in respect of the cause of action for which the action was brought becomes a *res judicata* and, therefore, operates as a bar to a second action based on the same cause of action ".

In this case Mr. Perera contended that when the plaintiffs were allowed to withdraw the two Court of Requests' cases, it must be assumed that the Commissioner of Requests, dismissed those actions as against this defendant subject to the condition that a fresh action would be instituted, and that a strict compliance with that condition was necessary for the valid emergence of another action. In this case there was no such compliance inasmuch as the action now relied upon is not a fresh action but an action that was already pending. The answer to this argument, as I conceive it, is that the Privy Council has ruled in the case already referred to that the fact that one case is pending is no bar to the institution of a second action in respect of the same cause of action. But Mr. Perera suggested that the Privy Council was directing their attention to the particular facts of the case before them and the bearing of section 207 of the Civil Procedure Code on that case, and that they did not consider the effect of sections 33 and 34 of the Code. This is hardly probable. But apart from that sections 33 and 34 of the Civil Procedure Code are not, in my opinion, inconsistent with that proposition. Section 33 only says that " every regular action shall . . . . be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them ". Similarly, section 34 lays down that the whole claim which a plaintiff is entitled to make in respect of the cause of action shall be included.

These sections do not prohibit the bringing of more than one action, and as pointed out in the passage I have already cited from Spencer Bower, so far as the general law of *res judicata* and the kindred topics go, a party has the technical right to litigate before different tribunals at one and the same time ! But, of course, the technical right is subject to the control of the Court to prevent its process being abused. In this instance, there is no possibility of that right being abused because in consequence of the withdrawal of the two Courts of Requests' cases against the defendant he can hardly say that he is exposed to a *bis vexatio*.

In regard to Mr. Perera's contention that the plaintiffs were given permission to institute a fresh action and not to proceed on with the present action, that is literally correct. But from the context it seems clear that although the plaintiffs' proctor in his motions asked that he be allowed to withdraw the Courts of Requests' cases with liberty to institute an action *rei vindicatio*, he really had in view this action which was already pending at the time and was an action *rei vindicatio*. That, at any rate, is how the defendant's proctor appears to have understood it for he specially asked the Court to note that " he reserves any objection he may have for the connected D. C. case ". " The connected D. C. case " was manifestly the present action. Quite apart from that view of the matter, in my opinion, the fact that the plaintiffs had been given permission to file a fresh action did not preclude them from proceeding with the present action. If their proctor had explicitly stated what, as I have

already observed, appears to be implied by his motions in the light of what transpired in Court, namely, that he was withdrawing these Courts of Requests' actions against the present defendant in order to proceed with the present action against him, I feel confident that that application would have been allowed, for it was the obvious and most convenient course. Mr. Perera concedes that the dismissal of the present action will not prevent the plaintiffs from bringing another action *rei vindicatio* in terms of the permission given them. This admission reveals the captious nature of the argument on behalf of the appellant.

As I have already held there was nothing to prevent this action existing side by side with the two Courts of Requests' cases. Once the plaintiffs obtained permission to withdraw those cases with liberty to institute a *rei vindicatio* action, even if we assume that the plaintiffs and the defendant and the Court contemplated a fresh action, it was open to the plaintiffs either to institute that fresh action, or to proceed with the action already pending. The plaintiffs have chosen the more convenient course of going on with a case already on the roll in which a final adjudication can be reached on all the matters in dispute between the parties. There is no likelihood at all that the plaintiffs will institute a fresh action on the permission granted by the Court. That would be a perfectly futile proceeding and if the plaintiffs indulge in it, the Court can exercise its undoubted jurisdiction to prevent such an abuse.

I would, therefore, dismiss the appeal with costs and send the case back for trial on the issues of fact.

FERNANDO A.J.—I agree.

Appeal dismissed.