Present : Garvin and Jayewardene A.JJ. 1923.

VELUPILLAI *v.* MUTHUPILLAI *et al.*

140—D. C. Jaffna, 16,043.

Application for letters of administration—Issue whether applicant was legitimat son of intestate—Decision of Court that applicant was not legitimate son—Mortgage by applicant pending inquiry into his claim for letters—Action on mortgage bond—Sale in execution—Action by purchaser against adminsitrator—Res judicata—*Estoppel—Registration of* lis pendens—*Privy.*

K died intestate, and P, claiming to be a son of K by his mother S, applied for letters of administration ; the second defendant claimed to be the son of K by his mother, the first defendant. An issue was raised as to whether K was married to S or first defendant, and the Court held in favour of first defendant, and granted letters to second defendant pending these proceedings.

P mortgaged the land in question. The bond was put in suit, and at the sale in execution plaintiff purchased it. In an action by plaintiff for declaration of title,—

Held, that the judgment in the administration suit declaring that K was legally married to first defendant, and that the second

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defendant is his legitimate son and sole heir, was *res judicata* between first defendant and P and their privies, and that plaintiff was estopped by *res judicata* from questioning those findings.

The fact that the *lis pendens* was not registered in the administration suit did not enable the plaintiff to re-litigate the matter, as the administration suit did not "affect or relate to land" within the meaning of section 27 A of the Registration Ordinance.

Under the Common law a *lis pendens* arises as soon as the opposite party has been served with summons or has received notice of the action, and a judgment is conclusive against a person as privy in estate to a party litigant if he derives title under the latter by an act subsequent to the action.

The judgment in question is one *in personam*, and not *in rem*, although given by a Court in the exercise of its probate jurisdiction; but its binding effect cannot be restricted to the very property of claim in question in those proceedings.

Generally speaking, estoppel by *res judicata* may arise either where there is "identity of cause of action" or where there is "identity of point in issue."

A purchaser in execution of a mortgage decree is a privy of the mortgagor for the purpose of the law of *res judicata*.

THE facts are set out in the judgment.

Hayley (with him *S. Rajaratnam*), for plaintiff, appellant.

Arulanadam (with him *Nadarajah*), for the respondents.

Cur. adv. vult.

October 2, 1923. JAYEWARDENE A.J.—

In this case a question of estopped by *res judicata* arises for decision. One Kanapathipillai was admittedly the owner of the land in dispute in the case. He died intestate in the year 1919. K. Ponnampalam, claiming to be his son by Sinnatankam, who he alleged was married to his father, made an application for letters of administration to his estate on February 24, 1919. His application was opposed by the second defendant, Chelliah, who claimed to be the legitimate son of Kanapathipillai, who had married his mother, the first defendant, about the year 1875. Kanapathipillai's marriage with the first defendant was not registered, while his marriage with Sinnatankam was registered in 1883. In these proceedings an issue was raised as to whether Kanapathipillai was married to the first defendant or to Sinnatankam, and, consequently, whether Ponnampalam or the second defendant was his legitimate son. The Court held that Kanapathipillai was married to the first defendant, and that consequently Ponnampalam was not his legitimate son, and letters of administration were ordered to be issued to the second defendant on August 28, 1919. While these proceedings were pending, Ponnampalam mortgaged the land in question to one

Parupathy by mortgage bond of April 30, 1919. This bond was assigned to the plaintiff on December 8, 1919. The plaintiff put the bond in suit, and, in execution of the decree, purchased the property on Fiscal's transfer dated August 19, 1920. Basing his title on the mortgage bond and the Fiscal's transfer, the plaintiff sues the defendants for a declaration of title in his favour. The defendants contend that they are the wife and heir, respectively, of Kanapathipillai, and also plead the judgment in the administration suit as *res judicata*. The learned District Judge has decided both questions in defendant's favour. The plaintiff appeals, and contests the finding of the District Judge on both the questions. On the evidence recorded in this case, there is, I think, a great deal to be said in support of his claim that the mortgagor is the legitimate son of Kanapathipillai. But, in my opinion, he is concluded by the judgment in the administration suit. It appears that the second defendant filed his objections to the grant of administration to Ponnampalam, on the ground of his illegitimacy, on March 26, 1919, and the matter was fixed for inquiry on the 27th of the same month. The mortgaged bond was executed on April 30 following. So that it was executed *pendente lite*. It is contended that as the *lis pendens* was not registered the decision in the administration suit does not bind the mortgagee. Under section 27A of the Registration Ordinance, No. 14 of 1891, as amended by Ordinances No. 29 of 1917 and No. 21 of 1918, no *lis pendens* affecting, or relating to land or other immovable property shall bind a purchaser, mortgagee, &c., unless it is duly registered ; but, in my opinion, the administration suit did not affect or relate to land and section 27A has no application here. *In re the Estate of Rawther*,[1] this Court, in refusing an application for leave to appeal to the Privy Council by an applicant whose application for letters of administration had been dismissed, remarked that title to property was not involved in the slightest degree in the action. Therefore, the general principle applies to this case, that a person who purchases property pending an action buys its subject to the result of the action. Under the Common law a *lis pendens* arises as soon as the opposite party has been served with summons or has received notice of the action (*Perera v. Silva*,[2] *Muheeth v. Nadarajapilla*[3]), and a judgment is conclusive against a person as privy in estate to a party litigant, if he derives title under the latter by an act subsequent to the action (*Arumugam v. Thampu*[4]). The plaintiff having taken the mortgage after the second defendant had filed his objections and after the issues had been fixed for trial, he is bound by the result of the proceedings in the administration suit. Has the judgment of the Court in the administration suit that Kanapathipillai was married to the first defendant and that Ponnampalam is not his legitimate son the

[1] *(1903) 3 Bal. Rep. 25.*
[2] *(1910) 13 N. L. R. 81.*
[3] *(1917) 19 N. L. R. 461.*
[4] *(1912) 15 N. L. R. 253.*

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effect of a *res judicata?* It is contended that in the case of judgments *in personam*, the decision is only binding in respect of the property or the claim in litigation in that suit; it does not affect other property or claims held or made under the right which was in question in the previous case. No doubt the judgment in question is one *in personam* and not *in rem*, although given by a Court in the exercise of its probate jurisdiction. But I do not think that its binding effect can be restricted to the very property or claim in question in those proceedings. It has been held by a Full Bench (Lascelles C.J., Wood Renton J., Pereira J. *dissentiente*) of this Court that sections 34, 207, and 406 of the Civil Procedure Code do not contain the whole of the law of *res judicata* prevailing in Ceylon, and that the general principles of *res judicata* obtaining in England and India are applicable here (*Samichi v. Pieris*[1]).

Generally speaking, estoppel by *res judicata* may arise either where there is identity of "cause of action" or where there is identity of "point in issue." Where there is identity of causes of action, the judgment in the case is a bar to all further litigation upon the same property, claim, or right. In such cases it must be shown that there is identity between the present and former causes of action. If they are identical, the plea of estoppel is good. This is the class of estoppel by *res judicata* dealt with in the explanation to section 207. In the other class of cases identity of causes of action is immaterial, and the only question to be considered is whether the "point in issue" is identical in the two cases. In such cases the judgment on the issue creates an estoppel with regard to all matters in dispute upon the decision of which the finding was based. This rule was laid down by De Grey C.J. when delivering the unanimous opinion of the Judges in the case known as *The Duchess of Kingston's Case*.[2] He said :—

> "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seems to follow as generally true: first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming identically in question in another Court for a different purpose."

Also see *Outram v. Morewood*.[3] It is upon the basis of the principle laid down in these English authorities that the Full Bench, in *Samichi v. Pieris* (*supra*) held that it was not always essential that

[1] *(1913) 16 N. L. R. 257.*
[2] *(1776) 2 Smith's L. C. 731.*
[3] *(1803) 3 East. 346.*

the subject-matter of the litigation in the two suits should be identical, and that, very often, the true test is the identity of the matter in controversy. See also *Dingiri Menika v. Punchi Mahatmaya*,[1] *Kantaiyar v. Ramu*,[2] and *Loku Banda v. Piyadasa Unanse*.[3] It may be that if the question had been looked at in the way I have indicated, the necessity for expanding the meaning of the term "cause of action" so as to include a "point in issue" might have been obviated. Tested in the light of these principles, the judgment in the administration suit on the issues of marriage and legitimacy is *res judicata* here. An English case which is very apposite to the present case is *Barrs v. Jackson*,[4] often referred to and followed in our Courts. I extract a passage from the judgment of Wood Renton J. in *201—D. C. Kalutara, No. 4,836*,[5] which states the facts and the effect of the judgment :—

> "A suit was instituted in the Prerogative Court for administration to the estate of Miss Smith. The defendant, Jackson, claimed a grant of administration as her next of kin. A rival claim was put forward by Mrs. Barrs. The Ecclesiastical Court held that Mr. Jackson was the next of kin, and granted letters of administration to him on that basis. Mrs. Barrs afterwards instituted in the Court of Chancery a suit claiming, as next of kin, the residuary estate of the intestate. Jackson pleaded that the sentence of the Ecclesiastical Court was *res judicata* as regards her claim in the Chancery action. Vice-Chancellor Knight Pruce held that it was not. But Lord Lyndhurst on appeal (*1845, 1 Ph. 582*) held that it was, on the ground that the judgment of the Ecclesiastical Court had turned upon the question which of the parties was next of kin to the intestate, and that that judgment was decisive of the same question in a subsequent suit in the Court of Chancery between the same parties for administration. The scope of the case *Barrs v. Jackson* (*supra*) is explained by Lord Penzance in *Spencer v. William*.[6] If two parties have once, before a Court of competent jurisdiction, litigated any question of fact, and that question has been finally decided, it is not reasonable that either of them, in any other Court, should re-open it."

Barrs v. Jackson (*supra*) thus is on all fours with the present case, and its *ratio decidendi* is applicable. Therefore, the judgment in the administration suit declaring that Kanapathipillai was legally married to the first defendant, and that the second defendant is his legitimate son and sole heir, is *res judicata* between the first

[1] (*1910*) *13 N. L. R. 58.*
[2] (*1909*) *13 N. L. R. 161.*
[3] (*1917*) *4 C. W. R. 155.*
[4] (*1845*) *1 Y. & C. 585 ; 1 Ph. 582.*
[5] (*1913*) *16 N. L. R. 267.*
[6] (*1891*) *L. R. 2 P. & D. 235–236.*

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defendant and Ponnampalam and their privies, and it is not open to the plaintiff, if he is a privy of Ponnampalam, to raise the same issue in the present litigation.

But it is contended that the plaintiff is not a privy of Ponnampalam, as he is a purchaser in execution, and is not bound by estoppels, whether by *res judicata* or otherwise, that bind his judgment-debtor. In support of this contention Mr. Hayley relied on several local cases (*Kalu Banda v. Dingiri Banda*,[1] *Tilliampalam v. Chinnapillai*,[2] *Sandrasagram v. Coomarasamy*[3] and *Poochy v. Waloopillai*[4]) and on the judgment of the Privy Council in *Dinendronath v. Ramkumar Ghose*,[5] but the soundness of the local authorities have been doubted by Ennis J. in *Pedrupillai v. Dionisa*[6] and in *Rajapakse v. Fernando*.[7] In the former case he said :—

> " It appears that estoppels may arise by the voluntary conduct of a party or by the operation of law, and it seems to me that the principle that a judgment-creditor is not concluded by estoppels against his debtor applies only to estoppels which arise from conduct, and does not apply to an estoppel not brought about by the voluntary conduct of the debtor, but by an adverse judgment against him."

And in the latter case :—

> " A distinction appears at one time to have been drawn between the position of a purchaser on a sale in execution and the purchaser at a private sale, on the ground that the former obtained his title by operation of law freed from all incumbrances effected by the judgment-debtor subsequently to the attachment of the property sold in execution (*Dinendronath v. Rankumar Ghose* (*supra*)) ; but in the later case of *Mohamad Hasseem v. Kishori Mohun Roy*[8] it was held by the Privy Council that an auction purchaser was bound by an estoppel which bound the person whose right, title, and interest he purchased (*Caspersz : Estoppel, 4th ed., p. 214*)."

But it is not necessary to consider the soundness of the authorities relied on by Mr. Hayley, as all these cases refer to purchasers in execution of ordinary money decrees. But the plaintiff here is a purchaser in execution of a mortgage decree, and I do not think the same considerations apply to him. It has always been held that a mortgagee is not bound by judgments obtained against his mortgagor after the execution of the mortgage bond : *The Natal Land Colonization Co. v. Good*[9] and *Armugam v. Thampu* (*supra*),

[1] (*1911*) *14 N. L. R. 145.*
[2] (*1917*) *4 C. W. R. 311.*
[3] (*1917*) *4 C. W. R. 378.*
[4] (*1919*) *21 N. L. R. 335.*
[5] (*1881*) *7 Cal. 107 ; 8 I. A. 65.*
[6] (*1917*) *20 N. L. R. 143.*
[7] (*1918*) *20 N. L. R. 300* (*303*).
[8] (*1895*) *22 Cal. 909.*
[9] (*1868*) *L. R. 2 P. C. 121.*

where it was held that a judgment obtained against a mortgagor of land after the mortgage is *res inter alia acta* as to the mortgagee who was not a party to the action. The law is the same in India (*Bonomalee Nag v. Roylash Chundar*[1] and *Soshi Bashun Guha v. Gogan Chundar Shaha*[2]). These judgments raise the clear implication that a judgment obtained against the mortgagor before the mortgage would bind the mortgagee. The relation of mortgagor and mortgagee is created by contract, and it is by virtue of that contract that the property is sold when the mortgagor commits a breach of his agreement. A purchaser in execution of a mortgage decree stands in an entirely different position from that of a purchaser under an ordinary money decree, and it cannot be said that he does not derive title through or acquires title adversely to the mortgagor. Such a purchaser is, in my opinion, a privy of the mortgagor, for the purpose of the law of *res judicata*. The plaintiff is accordingly a privy of his mortgagor, Ponnampalam, and is bound by the judgment given against him.

The learned District Judge was, therefore, right in upholding the plea of *res judicata*. In these circumstances it becomes impossible to adjudicate on the facts afresh, and the appeal must be dismissed, with costs.

GARVIN A.J.—I agree.

Appeal dismissed.