1918.

Present: Bertram C.J. and De Sampayo J.

MARIAMMAI *et al.* *v.* PETHRUPILLAI *et al.*

220—D. C. Jaffna, 11,734.

Action under s. 247—Is the question whether judgment was obtained by fraud material?—Admission in lower Court—Binding effect on party—Res judicata.

In an action under section 247 of the Civil Procedure Code by the judgment-creditor, the question whether he obtained the judgment sought to be executed by fraud or collusion is relevant; but in an action by a person other than the execution-creditor, the *bona fides* of the creditor in the original action is not material.

Nothing is *res judicata* except between persons who were at issue on the occasion when the thing was adjudged or persons claiming through them.

" If a party in a case makes an admission for whatever reason, he must stand by it; it is impossible for him to argue a point on appeal which he formally gave up in the Court below. "

THE facts are set out in the petition of appeal as follows:—

1. . . . . .

2. Vitiyanal died in 1908, and her said daughters inherited in equal shares an extent of 1⅛ lachams of varaku culture on the northern side of the land, situated at Karaiur, called Paviluvalavu, which is in extent 2 2/6 lachams of varaku culture.

3. The second and third defendants disputed the claims of the seven daughters.

4. From the year 1909 there has been a series of actions between the rival claimants up to about the month of October, 1915. These actions were Nos. 6,532 and 10,109, D. C. Jaffna; and Nos. 8,914/A and 9,507/A, C. R. Jaffna.

5. The nett results of these actions were, that the daughters retained 5/7ths share of the land, and the second and third defendants gained the balance 2/7ths share.

6. In January, 1916, the second and third defendants found a friend in the first defendant-respondent, who sued the second and third defendants for Rs. 600 in case No. 11,043, D. C. Jaffna.

7. The first defendant-respondent obtained decree by default, and went straight up with his writ to seize the 5/7ths share, although the second and third defendants had other seizable property, well knowing that the 5/7ths share was decreed to belong to the daughters of Vitiyanal.

8. Claims were preferred. The appellant claimed 3/7ths. Their sister claimed 1/7th, and another sister's son claimed another 1/7th share.

9. There were conflicting judgments regarding the title of these shares. At the claim inquiry, too, the Court below upheld the claim of the one, and rejected the claim of the other two. Three actions under section 247 of the Code sprang up. The respondent (first defendant) who lost the seizure instituted case No. 11,891/A, and these appellants and another who lost their claim instituted cases Nos. 12,241/A and 11,734. Of these three cases, No. 11,891/A went to trial, and the other two were laid by awaiting the result of No. 11,891/A.

10. The Court below decreed, and it was upheld by Your Lordships' Court, that the first defendant-respondent cannot discuss the 1/7th share that was in dispute in case No. 11/891/A, on the ground that the action which led to the execution proceedings were instituted fraudulently and collusively.

11. This case, which is the subject of this appeal, was, after the aforesaid decree, listed for trial before the Court below, and on May 24, 1918, it was held that the execution proceedings were *bona fide*, and the 3/7ths share of the appellant is liable to be seized and sold under writ in case No. 11,043.

The plaintiffs appealed.

E. W. Jayawardene (with him *Joseph*), for appellants.

A. St. V. Jayawardene (with him *Mahadeva*), for respondents.

November 20, 1918. BERTRAM C.J.—

This is an action under section 247 of the Civil Procedure Code, and the main question in the case is whether the title is in the judgment-debtors. The question is, in fact, not arguable, because it appears that in the District Court a formal admission was made by the present appellants that the title was in the judgment-debtors. That admission ties the hands of the present appellants. They are bound by that, and the whole of Mr. Jayawardene's

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argument has been an elaborate and laborious attempt to escape from that position. If a party in a case makes an admission for whatever reason, he must stand by it; and it is impossible for him to argue a point on appeal which he formally gave up in the Court below.

The only other point was this. It is said that even though the title is in the judgment-debtors, yet the judgment-creditor is not in a position to assert it, because his whole action is fradulent, and is based upon a collusive promissory note. It is not necessary to go into the whole history of this action. But it may be mentioned that in a previous action under the same section the judgment-creditor was the plaintiff, and in that previous action the question of the *bona fides* of this promissory note was contested, and judgment was given against the judgment-creditor. In that action the question of the *bona fides* of the note and the collusiveness of the judgment was perfectly relevant. Under section 247 of the Civil Procedure Code it is provided that an action must be instituted within fourteen days, and that in the case of an execution-creditor the action is " to have the property declared liable to be sold in execution of the decree. " That being the object of the action of the execution-creditor, it is perfectly relevant to point out that he can have no such right, because his action is founded upon fraud or collusion. But the same section provides in effect, with regard to any claim by a person other than the execution-creditor, that his action is to establish " the right which he claims to the property in dispute." In that action the *bona fides* of the creditor in the original action in which judgment was obtained is not material.

Mr. Jayawardene has cited as against that proposition the case of *Abdul Cader v. Annamalay.* [1] I do not think that case really helps him. The effect of that case is that where a person brings an action under section 247, and claims to be in possession of the property, all that he need prove, in the first instance, is that he is in possession. But the onus is then shifted, and it is then for the execution-creditor affirmatively to make out a title in the execution-debtor. I do not think that the case can be put any higher than that.

It appears, however, to have been considered in the District Court that the question of the collusiveness of the action was material, and the District Judge went into that question. As a matter of fact, however, he found that the action was not collusive, and that the execution-creditor had a perfect right to bring an action. There can be no question that there were facts to justify such a finding. It is said against that, that the learned District Judge, in a previous case in which the very same facts were in issue, came to a diametrically opposite conclusion. This is no doubt open to comment. No doubt the learned District Judge had other material before him

[1] *(1896) 2 N. L. R 166.*

for the purpose of the second decision. At any rate, that decision must be taken to stand for the purpose of this action. Even, therefore, if it were material to inquire in this case whether the action in which judgment was obtained was a collusive one, we should have to take the finding of the learned District Judge that it was not, and the question, therefore, of the relevancy of that consideration need not be further discussed.

Mr. Jayawardene also raised a further point, which hardly admits of argument. In both these actions under section 247 the judgment-debtors were formally made defendants. He now wishes to suggest that, because in the present action the execution-debtor and those two execution-creditors are co-defendants, the old original finding of the District Judge that the action was a collusive one is *res judicata*. It is hardly necessary seriously to consider that proposition. Nothing is *res judicata* except between persons who were at issue on the occasion when the thing was adjudged or persons claiming through them. In my opinion, for the reasons I have given, the appeal must be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.