1939 *Present :* **de Kretser J.**

ARULAMPALAM *et al.* *v* KANDAVANAM.

136—C. R. Jaffna, 4,656.

Res judicata—*Two actions pending—Decision of later action binding on the earlier action—Agreement to abide by decision of one action.*

A plea of *res judicata* would operate in bar of an action which was instituted before the action the decision of which is pleaded in bar, provided the other conditions are satisfied.

APPEAL from a judgment of the Commissioner of Requests, Jaffna.

S. J. V. Chelvanayagam, for third defendant, appellant.

N. Nadarajah (with him *N. Kumarasingham*), for plaintiff, respondent.

Cur. adv. vult.

November 30, 1939. DE KRETSER J.—

The third defendant-appellant in this case had obtained a money decree against the first and second defendants, and in execution thereof had caused the Fiscal to seize two lands on May 20, 1936. The present plaintiff preferred claims thereto based upon a transfer in his favour dated May 7, 1936, from the first and second defendants. His claims were both dismissed, and as they were made in different Courts they were dismissed on different dates. He then brought these two actions, viz., the present case on November 3, 1936, and the other case (No. 11,319) in the District Court of Jaffna on March 15, 1937. In each case the appellant took up the same position that the transfer had been executed in fraud of creditors.

On March 21, 1938, Counsel stated to the Court that the decision in the District Court case would settle this case, and accordingly this case was laid by and later relisted for trial. The decision in the District Court case was then pleaded as *res judicata* and that plea was upheld.

It is admitted that it is exactly the same point now in dispute as was raised in the District Court case, and that the issues are the same in both cases and the evidence would be the same. But it is contended that because this case was instituted before the decision of the District Court case therefore the plea of *res judicata* was not available.

Neither counsel had drawn my attention to what was in effect agreed upon between the parties in the lower Court on March 21, 1938, namely, that the decision in the District Court case should govern this case. It seems to me that the learned Commissioner would have been justified in making his order on this ground alone.

Now, the doctrine of *res judicata* is based primarily on the policy that it is in the interests of the State to have an end of litigation : *interest reipublicae ut sit finis litium.* It also takes into cognizance the maxim—*Nemo debet bis vexari pro eadem causa.* As stated in *Halsbury (Vol. 13, p. 332, para. 464)* " . . . . The true view seems to be that the legal rights of the parties are such as they have been determined to be by the judgment of a competent Court. But the conclusiveness of the determination rests upon the same principles in each case. The doctrine of *res judicata* is not a technical doctrine applicable only to records : it is a fundamental doctrine of all Courts that there must be an end of litigation."

In *Balkishan v. Kishan Lal* [1] the decision pleaded as *res judicata* was given in a case which had been instituted later in point of time. The case was referred to a Divisional Bench, and Justice Mahmood (with whom Edge C.J. and Straight J. agreed), said :—" The question relates to the scope of the maxim *pendente lite nihil innovetur.* That the maxim governs alienations *pendente lite* cannot be doubted. Does it also relate to adjudications which have taken place during the pendency of one litigation in another litigation which, though commency *before,* had not *terminated* when the present litigation was begun ?

" So far as I am aware, this exact question has not been settled by any definitely authoritative decision in England or in India. I am therefore not hampered by any case law on the subject, and feel myself free to adopt such views as I consider most consonant with legal principles.

" It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt.* This saying of *Voet* is in accord with the maxims *Nemo debet bis vexari pro una et eadem causa,* and the broader maxim *Interest reipublicae ut sit finis litium.*

" This being so, the doctrine, so far as it relates to prohibiting the retrial of an *issue,* must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a *final* judgment pronounced meanwhile in such previous litigation by a competent Court (the identity of parties and other conditions being satisfied), should operate as *res judicata* preventing the Judge dealing with the later

[1] *11 All. 149.*

litigation from adjudicating differently. If this is not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated."

In the case of *Gururajammah v. Venkatakrishnama Chetti*[1] the same point came up for decision before White C.J. and Davies J. It was held that the first suit was barred by the decision in the second suit, the Judges approving of the statement of law in the Allahabad case, that "the doctrine so far as it relates to prohibiting the retrial of an issue must refer not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue". In the Madras case too the earlier suit had been laid by pending the decision in the later suit, and the Judges began their judgment by expressing the opinion that it was not open to one of the parties to go behind the judgment in the later suit.

Nathan (*Vol. iv., p. 2153*) refers to the case of *Bertram v. Wood*[2] in which de Villiers C.J. said :—"It is laid down in the *Digest* as a rule of law that a matter once adjudged is accepted as the truth—*res judicata pro veritate accipitur*. The meaning of the rule is that the authority of *res judicata* induces the presumtion that the judgment upon any claim submitted to a competent court is correct, and this presumtion, being *juris et de jure*, excludes every proof to the contrary. The presumption is founded upon public policy, which requires that litigation should not be endless . . . .".

In fact the very term *res judicata* means that the matter in dispute has been adjudicated upon previously. The rule that the rights of parties ought to be decided as at the date when an action was instituted cannot apply to every circumstance. Once the third defendant's claim to have the plaintiff's deed set aside as fraudulent was adjudicated upon, that claim no longer existed or was available to him.

One might arrive at a most ridiculous situation otherwise ; for it is conceivable that contrary decrees might be passed in the two cases, and that a third claim may lead to a third case. Which of the two earlier cases could then be pleaded as *res judicata* ? All considerations therefore point to the correctness of the decision in the lower Court.

But it is said that a contrary view should be taken because of the case of *The Delta* (*1 Probate Div. 1875-6, p. 393*). To begin with, that was a case where the decision given in a *foreign* Court was invoked, and a number of witnesses had to be examined with regard to the foreign law ; and the English Court held that their evidence left it at least doubtful whether the judgment of the foreign Court would be regarded as *res judicata* in the foreign country. The Court also found that the foreign judgment had not been given on the merits of the case but on matters of form and therefore could not be relied upon as a bar. It did express the opinion that at the time when the suit was begun in England there was no *res judicata* but only a *lis alibi* pendens. But they used that fact to emphasize that one party might have put the other to the election of going on with one of the cases, and not having done so he ought not to be allowed to plead the decision in the other case as a bar.

[1] *24 Mad. 34.* [2] *10 S. C. 177.*

The case of *Houston v. Marquis of Sligo* [1] was also relied on. In that case Pearson J. doubted that the decision in *The Delta* would apply in view of the existing practice, and decided the case on other grounds. Pearson J. confessing that he was attracted by the argument that a plea of *res judicata* was a plea in bar to the *institution* of an action and that consequently it could not succeed in a case brought before the later judgment was delivered. It is merely a passing opinion and it makes no appeal to me. It is a fact that the plea is generally based on a decision given prior to the institution of an action, but that fact must not be allowed to cloud the question, nor in my opinion is it correct to say that the plea bars only the institution of a fresh action.

The appeal fails and is dismissed with costs.

Appeal dismissed.