1943 *Present* : **Soertsz S.P.J. and Keuneman J.**

SOCKALINGAM CHETTY, Appellant, *and* KALIMUTTU CHETTY, Respondent.

350, 351 and 352—D. C. Colombo, 1,839 and 1,871.

Res judicata—*Action dismissed, parties having settled dispute—Statutory bar against fresh action—Decree of dismissal—Not a registrable instrument—Registration of Documents Ordinance (Cap. 101) s. 8 (b)—Civil Procedure Code, s. 406.*

Where an action for declaration of title to land is dismissed, the parties having settled their dispute, the dismissal would operate as a statutory bar against the institution of a fresh action upon the same cause of action.

Such a statutory bar is binding on parties as well as their privies.

Held, further, that a decree entered in such circumstances is not a registrable instrument within the meaning of section 8 (b) of the Registration of Documents Ordinance.

THESE were appeals in two actions, which were consolidated for the purpose of argument. Case No. 350 was a partition action instituted by one Thiagarajah for the partition of two lands. The other case No. 351-352 was instituted by one Kalimuttu for a declaration that Thiagarajah held the two lands in the partition case and two other lands for his benefit and for an order directing Thiagarajah and his vendors to execute a valid deed conveying title to him in respect of these four lands.

The learned District Judge entered decree in favour of the plaintiff in case No. 351-352 in terms of the prayer and dismissed the partition action No. 350.

H. V. Perera, K.C. (with him *N. E. Weerasooriya, K.C., D. W. Fernando* and *F. W. Obeyesekere*), for the plaintiff, appellant in S. C. No. 350, the 3rd defendant, appellant in S. C. No. 352 and the 3rd defendant, respondent in S. C. No. 351—In regard to case No. 351-352, the action for declaration of trust must fail because section 93 of the Trusts Ordinance (Cap. 72) is inapplicable to the facts of the present case. The transfer deed of June 13, 1935, in favour of Kalimuttu was void being obnoxious to section 17 of the Partition Ordinance. Nor can the plaintiff (Kalimuttu) rely on the agreement in deed No. 841. That agreement too was void under section 17 of the Partition Ordinance. Even if it was valid, according to its very terms, that agreement expired in one month. Thiagarajah bought the properties in question from Sockalingam and Asupathy long afterwards. It cannot therefore be said that at the time

of that sale there was an "existing" contract of which specific performance could be enforced. A similar question arose in *Paiva v. Marikar et. al*[1]. The convenants in the deed for further and better assurance of the title conveyed do not help the plaintiff. This case can be easily distinguished from that of *Hewawasan v. Gunasekere*[2].

To come now to case No. 350, the District Judge was wrong in holding that the decree in the old case No. 49,758 operated as *res judicata* in the present case. The order "action dismissed" in case No. 49,758 had the effect of no more than a termination of the proceedings. It had not the same consequences as a termination of trial after adjudication of rights either by trial or of consent. Nothing is *res judicata* which has not been in issue between the parties. Further, the statutory bar imposed by section 406 of the Civil Procedure Code is a personal bar and cannot bind the plaintiff in this case. That bar cannot be elevated to the rank of *res judicata*. There are three kinds of bars conceivable in law, imposed (1) by the general doctrine of *res judicata*, (2) by the extension of that doctrine in section 207 of the Civil Procedure Code which is constructive *res judicata* and which is confined to the same cause of action, and (3) by a statutory bar such as is enacted in section 406 of the Civil Procedure Code. None of these bars stands in the way of the plaintiff in the present case.

The failure to register the decree entered in case No. 49,758 removes the obstacle to our title. That decree was a registrable instrument. Under section 8 of the Registration Ordinance (Cap. 101) not only a decree creating a right affecting land but also one purely declaring such a right is registrable.

L. A. Rajapakse for the first and second defendants, appellants in S. C. No. 351 and the first and second defendants, respondents in S. C. No. 352.

N. Nadarajah, K.C. (with him *W. S. de Saram* and *Kingsley Herat*) for first to eighth and tenth defendants, respondents in S. C. No. 350 and the plaintiff, respondent in S. C. Nos. 351 and 352—On the question of *res judicata*, a statutory bar is created by the combined effect of sections 33, 34, 207 and 408 of the Civil Procedure Code. All these sections are discussed in *Annamaly Chetty v. Thornhill*[3]. The decree of dismissal in case No. 49,758 must operate as *res judicata—Hukm Chand on Res Judicata p. 128; Nicholas v. Asphar et. al*[4]; *Perera v. Perera et. al*[5]; *Menik Etana v. Punchi Appuhamy et. al*[6]; *Fernando v. Perera*[7]. It binds not only the parties but also their privies—*Banda v. Naccire et. al*[8]; *Chinniah v. Suppramaniam et. al*[9].

The decree in case No. 49,758 is not a registrable instrument. A decree dismissing an action cannot be said to create or declare title. Even assuming that it is registrable, our claim is not based on the decree, and no question of adverseness arises. See *Mohamad Ali v. Weerasuriya*[10].

[1] *(1936) 39 N. L. R. 255.*
[2] *(1926) 28 N. L. R. 33.*
[3] *(1932) 34 N. L. R. 381.*
[4] *I. L. R. (1896) 24 Cal. 216.*
[5] *(1931) 32 N. L. R. 197.*
[6] *(1941) 21 C. L. W. 14.*
[7] *(1923) 25 N. L. R. 197.*
[8] *(1923) 24 N. L. R. 425.*
[9] *(1929) 7 Times 68.*
[10] *(1914) 17 N. L. R. 417.*

As regards case No. 351-352, if the transfer deed of June 13, 1935, is void, we can fall back on the agreement embodied in deed No. 841. That agreement is not prohibited by section 17 of the Partition Ordinance. See *Subaseris v. Prolis*[1]. An agreement to transfer is not an alienation. The rights under the agreement revive when a conveyance executed to implement that agreement becomes invalid owing to illegality—*Silva v. Silva et. al*[2]; *John Appuhamy v. William Appuhamy*[3]. The covenant for further assurance in the deed of transfer is a continuing contract and can be enforced—*Norton on Deeds (2nd ed.) pp. 621, 623-4.* Specific performance can be ordered. The cause of action for specific performance arises only after the lapse of the month mentioned. The agreement falls within the first two categories mentioned in *Fry on Specific Performance (6th ed.) pp. 65-6*; the case of *Paiva v. Marikar*[4] dealt with an agreement of the third category mentioned in Fry. See also *Aiyar and Aiyar on Indian Trusts Act p. 591*; *Ismail v. Ismail*[5]; *Perera v. Pedrick Appuhamy*[6]. Section 93 of the Trusts Ordinance is applicable to the facts of the present case. The "existing contract" contemplated in that section is a contract capable of enforcement at law as opposed to a contract which has been executed and discharged.

H. V. Perera, K.C., in reply.—The agreement in deed No. 841 must be deemed to have been discharged in one of three ways, namely, by performance or by breach or by impossibility of performance. The case of *Paiva v. Marikar* (*supra*) is directly applicable. If a conveyance is void all the covenants attached to, and dependent on, it are also bad. Specific performance is refused where the original conveyance itself is bad—*Norton on Deeds (2nd ed.) p. 621.*

The rule of *res judicata* will apply only where there is a judicial determination in respect of some contested issue or matter—*Hukm Chand on Res Judicata, p. 111*; *Spencer Bower on Res Judicata, p. 28*; *Vol. I of Chitaley and Rao's Commentary on the Indian Civil Procedure Code (1935) p. 211.*

The decree in case No. 49,758 was registrable. The ruling in *Mohamad Ali v. Weerasuriya*[7] is now superseded by, and should be read in the light of, section 8 (*b*) of the present Registration Ordinance. Our title must prevail over that of the defendants—*Saravanamuttu v. Solamuttu*[8]; *Madar Lebbe v. Nagamma*[9].

Cur. adv. vult.

April 9, 1943. SOERTSZ J.—

By agreement of Counsel the appeals in these two cases were consolidated, and so submitted for our consideration. Case No. 350 was an action for partition instituted by one Thiagarajah on June 20, 1940, for the partition of the two lands described in the schedule of the plaint in that case.

The other Case No. 351-352 was instituted on July 24, 1940, by one Kalimuttu who sought a declaration that Thiagarajah already referred to held the two lands in the partition case, and the two other lands

[1] *(1913) 16 N. L. R. 393.*
[2] *(1909) 13 N. L. R. 33.*
[3] *(1937) 7 C. L. W. 56.*
[4] *(1936) 39 N. L. R. 255.*
[5] *(1921) 3 C. L. Rec. 156.*
[6] *(1920) 7 C. W. R. 161.*
[7] *(1914) 17 N. L. R. 417.*
[8] *(1924) 26 N. L. R. 385.*
[9] *(1902) 6 N. L. R. 21.*

described in the schedule of the plaint, for his (Kalimuttu's) benefit, and he asked for an order directing Thiagarajah, and his vendors to execute a valid deed conveying title to him in respect of these four lands.

The learned trial Judge entered decree dated August 16, 1941, in favour of the plaintiff in case Nos. 351-352 in terms of the prayer in the plaint, and on August 23, 1941, he entered decree dismissing the partition action. Hence these appeals.

For the purpose of these cases, it is sufficient to go back, in the history of the four lands involved, to the year 1932 when, on July 29, in that year, Sockalingam and Asupathy the vendors to Thiagarajah sued Kalimuttu and some others for declaration of title to a one-third share of these four lands. In that case the parties reached a settlement and notified it to the court by a motion dated May 23, 1935. In the motion, deed No. 841 was mentioned as the deed which embodied the terms of their agreement. In virtue of this motion, they obtained a postponement of the trial, and then on June 13, 1935, they submitted another motion to the court stating that :—

> "Deed of transfer having been executed this day according to agreement No. 841 dated May 21, 1935, I (*i.e.*, the plaintiffs' proctor) move that the plaintiffs' action against all the defendants be dismissed without costs."

All the parties indicated their consent to this by attesting the motion. Thereupon, decree bearing the same date as the motion was entered dismissing the plaintiffs' action without costs.

But, at the date of the deed of transfer, there was pending a partition action involving the lands transferred. The transfer was therefore, obnoxious to section 17 of the Partition Ordinance and void, and Sockalingam, Asupathy and Theagarajah seized the opportunity, and the two former conveyed these interests to the last named after the termination of the partition case.

From this statement of facts it is clear that, although 38 issues were framed in the Court below, the main questions arising for consideration are (1) whether Theagarajah holds the lands in question for the benefit of Kalimuttu and whether Theagarajah, Sockalingam and Asupathy are liable to execute a deed in favour of Kalimuttu. (2) Whether in view of the manner in which the old case No. 49,758 terminated, Theagarajah is barred from setting up the title he derived on the deed from Sockalingam and Asupathy as against Kalimuttu.

In regard to the first question, the learned trial Judge rightly found that the deed given by Sockalingam and Asupathy to Kalimuttu was void, and that if all that Kalimuttu could rely on was that deed, the covenants in that deed for assuring the title conveyed, were themselves, avoided and of no avail. But he took the view that inasmuch as that deed was preceded by an agreement to sell, although the deed of sale was void, the covenants in that deed for further and better assurance of the title conveyed, stood. This view is quite unintelligible to me. The deed of agreement purported, on the part of the proposed vendors, to "transfer and assign . . . . all the right, title, and interest *if any*" that they had to or in the land in question within a period of one month from the date of the agreement. That is precisely what those

parties did, and, ordinarily, on that being done the agreement would have been discharged by *performance*. But it is contended that as the deed given in compliance with the agreement was void, the agreement remained undischarged and the promissors must now implement it. The answers to that are, in my opinion, many. Firstly, the promissors did not agree to convey a good title but such title, if any, as they had or might acquire during the period fixed for the performance of the agreement. Secondly, assuming that the agreement cannot be regarded as discharged by such performance as there was, because there was not even a valid conveyance, then it must necessarily be regarded as having been discharged by *breach* inasmuch as the period of one month agreed upon by the parties had elapsed without a *valid deed* being given. Thirdly, during the whole period fixed for the performance of the contract a valid deed could not have been given, and the agreement was discharged by reason of impossibility of performance. To say that because it was impossible for a valid deed to be given within the stipulated period, an obligation arose to give such a deed when it became possible in law to do so would in my opinion be nothing less than to make a new contract for the parties. I am, therefore, of opinion that at the date of the sale by Sockalingam and Asupathy to Theagarajah there was no *existing* contract or agreement, and the really essential condition for the operation of section 93 of the Trusts Ordinance, in virtue of which the trial Judge held in favour of Kalimuttu, is absent.

The judgment the trial Judge entered in the case Nos. 351, 352 must be set aside and the plaintiff's action dismissed.

The second question arises for consideration in case No. 350. The trial Judge dismissed the action of the plaintiff, there, firstly because, in view of his finding that the plaintiff was under a legal obligation to transfer his title, it was not competent for him to maintain an action for partition, and secondly, because he held that the decree entered in the old case No. 49,758 "is *res judicata* and it is not open to the plaintiff to reagitate his title".

The first reason no longer applies. The second is attacked by Mr. H. V. Perera, on behalf of the plaintiff, on two grounds :—

(*a*) that the order dismissing that action was not made upon an adjudication on the matter in issue between the parties, but in order to terminate the case because there was no longer any question left for adjudication ;

(*b*) alternatively, that if the decree of dismissal gave rise to a plea of res judicata, or a cognate plea, that plea failed in this case, because the decree of dismissal was in effect, a registrable instrument and not having been registered it had to yield to the plaintiff's deed which was a subsequent instrument for valuable consideration, duly registered.

I am inclined to agree with the proposition that the dismissal of the action 49,758 in the circumstances in which it occurred does not amount to a *res judicata* in the strict sense of that phrase. As stated by Spencer Bower at page 17 of his book on Res Judicata "a judicium for purposes of estoppel means a decision or determination or adjudication of some

question of law or fact, whether such decision takes the form of an express judicial declaration or is, necessarily, involved in the command or prohibition which constitutes the judgment or judicial act in its coercive or operative aspect. Everything which answers to this description . . . . is deemed a judicial decision; and nothing which falls short of it . . . . is so deemed". In the case in question, nothing was submitted for the decision of the court and nothing was, in fact adjudicated upon and decided or determined.

But, that is not an end of the matter for, apart from *res judicata* properly so termed, there are certain statutory bars which preclude the bringing of an action when an earlier action relating to the same matter has been dismissed without a decision, determination, or adjudication of any question of law or fact. The dismissal of the plaintiffs' case, in this instance, was such a dismissal. It put a stop to the proceedings because in effect, the plaintiffs, the Domini Litis, withdrew it, and by operation of section 406 of the Civil Procedure Code, they would, in my opinion, have been rightly rejected if they had instituted case No. 350 for the partition of these lands. But Mr. Perera argues that these statutory bars differ from the bar of *res judicata* in that their operation is confined to the parties themselves, and do not affect privies and successors-in-title. I cannot see my way to accede to this argument. If it were sound, these statutory bars could be easily defeated and would be nugatory if transfers, &c., were executed by the parties bound by them.

Counsel's next line of attack was that the decree entered in the old case dismissing the plaintiffs' action, although it was entered in the circumstances already indicated, was a registrable instrument.

The question then is whether that decree was such an instrument.

According to section 6 of the Ordinance "instrument" means an "instrument affecting land". It will be observed that this action reproduces the phrase of section 16 of the old Ordinance No. 14 of 1891, namely "affecting land", but, probably in view of the ruling in *Mohamed Ali v. Weerasuriya*[1], section 8 (*b*) of the new Ordinance goes on to enumerate the instruments which shall in future be deemed to "affect land as . . . . all instruments including wills, decrees and orders of any court or authority and awards, which purport or operate to create, confer, declare, limit, assign, transfer, charge, incumber, release, or extinguish, any right, title or interest, whether vested or contingent, past, present, or future, to, in or over land, or which create or record or are evidence of any contract for effecting any such object, and also a notice or seizure under section 237 of the Civil Procedure Code."

The resulting position is that, today, "decrees and orders of any court or authority" are registrable instruments if they *purport* or *operate* to create, confer, &c., any right, title or interest . . . . to, in, or over land.

In the case of *Mohamed Ali v. Weerasuriya*, two of the three Judges held that a decree declaring parties entitled to land in an action *rei vindicatio* is not a judgment or order affecting land, and, therefore, not under the requirement of registration for the purpose of anticipating any priority that may be claimed for a subsequent instrument for a valuable

[1] *(1914) 17 N. L. R. 417.*

consideration. That was a ruling given as far back as in the year 1913, and it has been consistently followed without question. But, it is argued that its authority has been impaired by section 8 (*b*) of the new Ordinance inasmuch as in virtue of it a decree or order which *purports* even if it does not *operate* to declare any right, title or interest to, in, or over land, is a registrable instrument and that the ruling given in the case I have mentioned cannot be given on the law as it stands now. I agree. But can it be maintained that the decree of dismissal entered in case No. 49,758 *purports* to declare any right, title or interest in the plaintiffs or in the defendants in that case to, in or over land ? It certainly, does nothing of the kind so far as the plaintiffs are concerned, nor can it be said to *operate* to that end. If it does not purport or operate to do any such positive thing, nevertheless is it a registrable instrument in that, although it does not *purport* to, still it operates to *extinguish* any right, title or interest of the plaintiffs to, in or over land ? I do not think so. Despite the decree of dismissal, the plaintiffs' title such as it was, remains. Upon that title, he may sue, and may conceivably, succeed against parties other than the defendants. He may not, however, sue the defendants because his *cause of action* against them has been extinguished. A similar examination of the matter *vis a vis* the defendants shows that the decree of dismissal in question does not *purport* to declare, &c., any right, title or interest in them, in, to, or over land. Nor does it *operate* to do that. It simply leaves them as they were. It, obviously, does not *extinguish* any right, &c., of theirs in, to, or over land.

For these reasons, I am of opinion that such a decree of dismissal as was entered in case No. 49,758 differs entirely from a decree that purports or operates to declare in, &c., a party plaintiff or in a party defendant, or in both a right, title, or interest in, to or over land and is not a registrable instrument. The operation of such a decree as this is by way of the rule of law of *res judicata* or of similar bars created by statute.

In view of this conclusion to which I have come, it is unnecessary to consider the other interesting question raised whether, assuming the decree to have been registrable, there was "adverseness" between it and the subsequent deed. I dismiss this appeal. The result appears to be that in regard to the two lands in the partition case, Theagarajah's success in case No. 351—352 is in the nature of a Pyrrhic Victory. For the present, the other two lands in that case are not affected. In regard to costs, I think a fair order would be to divide costs in the Court below and in appeal in case No. 351–352 and to order Theagarajah to pay half taxed costs here and below in case No. 350.

KEUNEMAN J.—I agree.

Appeal dismissed.