Present: Lascelles C.J. and De Sampayo A.J.

1914.

APPUHAMY *v.* PUNCHIHAMY.

447—D. C. Negombo, 8,678.

Res Judicata—*Findings on two issues, either of which would justify the decree—Which finding would operate as* res judicata *in a subsequent action ?*

Plaintiff brought a partition action (No. 5,137) claiming an undivided share of a land as son of one Sepasin. This action was dismissed on the ground that plaintiff was not the son of Sepasin, and the Judge also held that the land sought to be partitioned was held dividedly. Plaintiff subsequently brought this action to partition another land claiming to be a son of Sepasin.

Held, that the issue as to whether the plaintiff was a son of Sepasin was *res judicata* by the decision of the former action.

Where there are two findings of fact, either of which would justify in law the decree which was made, the finding which in logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of the two findings unnecessary for the making of the decree, is the finding which can operate as *res judicata*.

"In the present case the first step was for the plaintiff to prove his title from the original owner of the land, and any question with regard to the division of the land would only arise after the plaintiff had established his descent from the original owner."

DE SAMPAYO A.J.—"It is well settled that the issue for the purposes of *res judicata* must be a substantial and not a mere incidental issue."

THIS is a partition action in which the plaintiff claimed an undivided half share of the land in question from his mother, who he alleged was the first wife of one Sepasin, the original owner of the land, and also a 1/32 share by inheritance from Sepasin himself.

The defendants denied that the plaintiff was the son and heir of Sepasin, and contended that the point was *res judicata* by the decree and judgment in case No. 5,137 of the District Court of Negombo.

The learned District Judge held that the claim of the plaintiff as the legitimate son of Sepasin was *res judicata* by the decree in the former action. From this judgment the plaintiff appealed.

Action No. 5,137 was instituted as long as July 11, 1903. It was a partition action, in which the plaintiff claimed certain undivided shares in a different land on the footing that he was a son of Sepasin. Evidence was heard, and the District Judge found that the plaintiff was not a legitimate son of Sepasin, and dismissed his action.

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The judgment in D. C. Negombo, 5,137, was as follows:—

The land in question, Ambagahawatta, belonged to Kaluhamy, Appuhamy, and Babahamy. On their death it devolved on their three children, Daniel (first defendant), Siriwedi Etana (seventeenth defendant), and Sepasin. Plaintiff claims a share as the son of Sepasin by his first marriage, and asks for a partition.

He produces no certificate of his birth or of his parents' marriage, and, on the other hand, the contesting defendants produce copy of certificate of Sepasin's second marriage, in which he declares himself as not married. This certificate is not conclusive, for in the villager's mind marriage and registration are always confused together, but it is of considerable weight, and to disregard it I should have to find strong evidence on the other side.

The strongest evidence in favour of plaintiff is that of Punchihamy, twentieth defendant, who admits under cross-examination that when she married Sepasin there was a child living with him and his mother in the house, and she does not deny it was the plaintiff. I entirely believe that plaintiff was brought up by Sepasin, and that he is his child. But I find the evidence not sufficient to presume, in face of the marriage certificate, that Sepasin's first connexion was a marriage, and that plaintiff is a legitimate son.

Again, I think there is another objection to the desired partition. It seems to me that the land is already possessed dividedly, being separated into three parts by long existing fences. On this ground also I think plaintiff fails in his claim for partition.

The action must be dismissed with costs.

F. BARTLETT.

A. St. V. Jayewardene, for the plaintiff, appellant.—The plaintiff was not in a position to appeal against the finding of the Judge in D. C. Negombo, 5,137, as the finding on the question of possession was strong, and there was no chance of getting it set aside. The finding on the question of legitimacy was incidental. The decision on the question of paternity was not essential for the decision of that case. [De Sampayo A.J.—The question of possession was incidental, but the decision mainly rested on the question of paternity.] Counsel cited *Run Bahadur Singh v. Lucho Koer*,[1] *Shib Charan Lal v. Raghu Nath*,[2] *Caspersz 59, 61.*

In the first case (5,137) the first issue was the question of common ownership, as the action was a partition action. [De Sampayo A.J.—The main question in a partition action is a question of title.] The question of title would only arise after the question of undivided possession is decided.

F. M. de Saram, for the defendant, respondent, not called upon.

Cur. adv. vult.

[1] *(1884) I.L.R. 11 Cal. 301,308.*

[2] *17 all 174.*

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His Lordship stated the facts, and continued:—

For the appellant it is contended that the finding that the plaintiff was not the lawful heir of Sepasin was not the real basis of the judgment, that it was not a material and necessary finding of fact in the sense that the judgment was a necessary result of the finding. It was argued that the judgment proceeded on another ground, namely, a finding that the land was already possessed dividedly, having been separated into two parts by long existing fences.

A perusal of the judgment shows beyond all doubt that what the Judge really proceeded on was his finding with regard to the illegitimacy of the plaintiff and that the previous division of the land was merely referred to incidentally as another circumstance which would be fatal to the plaintiff's claim.

We have been referred to the judgment in *Shib Charan Lal v. Raghu Nath*,[1] which deals with the question where there are two findings of fact, either of which would justify in law the decree which was made. There it was held that the finding which should, in the logical sequence of necessary issues, have been first found, and the finding of which would have rendered the other of the two findings unnecessary for the making of the decree, is the finding which can operate as *res judicata*.

The example given in the judgment in that case shows how strongly this authority tells against the appellant's contention.

In the case there given, A, alleging himself to be the legal representative of B, sues C for breach of contract between B and C. C pleads that A is not the legal representative of B, and that he (C) was a minor at the date of the contract. The Court finds that A is not the legal representative of B, and that C at the date of the contract was a minor. Of these two findings, it was held that the finding which would operate as *res judicata* between the parties was the finding that A was not the legal representative of B, because until A had established his title to sue on the contract as the legal representative of B, the defendant C could not be put to proof of his minority at the date of the contract.

Similarly, in the present case No. 8,678, the first step was for the plaintiff to prove his title from the original owner of the land, and any question with regard to the division of the land would only arise after the plaintiff had established his descent from the original owner.

I would also note that the second finding in that action (No. 5,137) is not in point of fact conclusive of the case. There were 29 defendants in the case, and it does not follow from the fact that the land had already been divided into three parts, and so held that the plaintiff was not entitled to a partition if he had proved his title.

[1] *17 All. 174.*

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In my opinion the question of the legitimacy of the plaintiff is clearly *res judicata* by reason of the judgment in the former action. I would dismiss the appeal with costs.

DE SAMPAYO A.J.—

I entirely agree, but I wish to add a word with reference to one of the authorities cited on behalf of the plaintiff-appellant. The judgment of the Privy Council in *Run Bahadur Singh v. Lucho Koer* [1] was relief on as supporting the proposition that where a judgment is given against a party on several issues, and where the party, feeling the strength of the decision on one of the issues which is decisive, abstains from appealing altogether, the judgment is not *res judicata* in regard to any of the other issues, though they may be equally decisive. In my opinion the Privy Council did not enunciate any such view. In that case the issue was as to whether two brothers were "joint" or "separate" in estate. The Court which gave judgment on that issue in the first suit, which was a rent suit, would have had no jurisdiction to adjudicate on the subject-matter of the later suit, which involved the question of title to the entire estate. The Privy Council, in the first place, decided that a judgment in order to be *res judicata* must be that of a Court of competent jurisdiction, and so dissented from the view of the Calcutta High Court that the judgment in the first suit was *res judicata* in the second suit, but in the second place held that the party in whose favour the High Court had given judgment on the ground of *res judicata* could support the judgment on the evidence relating to the question without any cross-appeal. It will be seen that that decision is no authority for the appellants. It is well settled, however, that the issue, for the purposes of *res judicata*, must be a substantial and not a mere incidental issue. In the present case it is quite clear that the principal and substantial issue in the first action was as to whether the plaintiff was a legitimate child of Sepasin. The matter of the already existing division of the land was a subordinate ground for refusing the partition applied for, and if the Court had decided the main question as to legitimacy in favour of the plaintiff, there would have been nothing to prevent the Court from confining the action to the separate portion possessed by Sepasin and proceeding with the partition on that footing. In these circumstances, even if the contention for the plaintiff were sound in law, there does not appear to me any foundation of fact for the argument that the plaintiff was prevented from appealing in the first action by reason of the finding on the matter of the existing division of the land, and that he is therefore not now bound by the judgment in that case even in respect of the question of legitimacy.

Appeal dismissed.

[1] *(1884) I. L. R. 11 Cal. 301.*