1948 *Present :* **Howard C.J. and Nagalingam J.**

BANDA, Appellant, *and* KAROHAMY, Respondent

S. C. 290—D. C. Kurunegala, 2,941

Res judicata—*Title accruing to defendant after institution of action—Not set up—Subsequent action by defendant—Cannot set up this title.*

A defendant is bound to set up by way of defence every ground available to him not merely at the date of the institution of the action but accruing to him thereafter and prior to judgment. If he fails to do so, he cannot in a subsequent action be permitted to rely on the self-same ground in support of his claim.

APPEAL from a judgment of the District Judge, Kurunegala.

H. V. Perera, K.C., with *Cyril E. S. Perera* and *T. B. Dissanayake*, for plaintiff appellant.

N. E. Weerasooria, K.C., with *W. D. Gunasekera*, for defendant respondent.

Cur. adv. vult.

December 6, 1948. NAGALINGAM J.—

A question of law relating to the doctrine of *res judicata* arises on this appeal. The facts which give rise to the question are briefly these. One Allis Appu was admittedly the owner of the land in dispute in this case. The land was sold in execution against him and was purchased by two persons, Saro Hamy and Ukku Menika, in whose favour Fiscal's conveyance dated December 8, 1931, was duly issued. They by deed (P 1) dated July 29, 1943, transferred the land to the plaintiff. Prior to the execution the Fiscal's conveyance, however, Allis Appu by a deed dated October

14, 1931, conveyed the land to one Lamina who by a deed of 1936 conveyed it to the defendant. The defendant instituted action No. 1604 of the District Court of Kurunegala on July 1, 1943, against the present plaintiff and two others claiming declaration of title to the land. The present plaintiff was one of the sons of Allis Appu and he was named the second defendant in the case. In that action the present plaintiff and his fellow contestants denied the title of the defendant to the land and set up title in themselves based firstly, on inheritance from Allis Appu and secondly, on prescriptive possession. After trial, judgment was delivered in favour of the present defendant declaring him entitled to the land and decree was entered on March 26, 1945. A couple of months later, namely, on June 9, 1945, the plaintiff commenced this action against the defendant for declaration of title to the land basing, however, his title on the conveyance (P 1), a title which admittedly was not set up by him in defending the earlier action. For the purposes of this case it is necessary to draw pointed attention to three salient dates. The earlier action by the present defendant against the present plaintiff and others was instituted on July 1, 1943, while conveyance in favour of the present plaintiff by Saro Hamy and Ukku Menika was executed about a month later, namely, on July 29, 1943, and the present plaintiff and his fellow contestants filed their answer in that action on September 8, 1943, that is to say, about five weeks after the execution of conveyance (P 1) in favour of the present plaintiff.

The defendant pleads that the decree in the earlier action operates as a *res judicata* in respect of the plaintiff's claim and that the plaintiff is debarred from re-agitating the question of title in this action. The plaintiff disputes the soundness of the plea basing his contention on the fact that at the date the previous action was instituted he had not acquired the title under conveyance (P 1) and therefore, was not under any obligation to set up by way of defence the title acquired thereunder.

The question that arises for determination, therefore, is whether a defendant is bound to set up by way of defence every ground available to him not merely at the date of institution of action, but accruing to him thereafter and prior to judgment. It has not been contested that where a defendant fails to put forward a defence in existence at or prior to the date of institution of action he would not be permitted to make use of that ground either by way of defence or attack in a subsequent action. It is, however, contended on behalf of the plaintiff that where a right or title vests for the first time on a defendant subsequent to the date of institution of action he cannot in law defend the action on the basis of the right or title that accrued since the institution of action. The explanation to section 207 of the Civil Procedure Code imposes no such limitation but it has been argued that as only rights in respect of the cause of action for which the action is brought should be set up and as the cause of action has to be determined by reference to facts existing at the date of institution of action, any right that accrues subsequently is therefore excluded. Reliance for this view is placed on the case of *Goonaratna v. Fernando* [1]. That was an action for declaration of title, ejectment and

[1] *(1913) 16 N. L. R. 429.*

damages. The defendants set up title in themselves but without claiming declaration of title in their favour. They only prayed for dismissal of the plaintiff's action. Thereafter they amended their answer by averring that subsequent to the institution of the action they had also acquired title to the land from the Crown. Objection was taken on behalf of the plaintiff to the defendants setting up by way of defence the title acquired by them from the Crown. The learned District Judge overruled the objection, but on appeal the judgment of the District Judge was reversed.

Pereira J., who delivered the judgment of the Court said,

> " However, as observed already, the defendants contented themselves with praying for dismissal of the plaintiff's claim . . . . Now, the defendants cannot succeed in their prayer for a dismissal of the plaintiff's claim unless they show that they did not oust the plaintiff, or they are in a position to justify the ouster by proof that at the date of the ouster they had a superior title, or were acting under the authority of somebody having a superior title. The mere fact that some third person had a title superior to that of the plaintiff is no justification at all of the ouster by the defendants. So that neither the fact that, at the date of the ouster pleaded, the Crown had title to the property in claim, nor the fact that, since the commencement of the action, the defendants have acquired title, *is relevant on the question whether the ouster was justified.*"

It will thus be seen that the learned Judge there was dealing with the defence to the ouster complained of by the plaintiff and his observations have no application to a case where the defendants pray for a declaration of title in themselves. In fact, the learned Judge gave his mind to this aspect of the matter when he said this :—

> " And as has been recently held by the Privy Council in the case of *Silva v. Fernando,* in an action *rem vindicare,* the plaintiff cannot succeed on the strength of a title acquired after the commencement of the action, although, possibly (I may add), *where a plaintiff having title at the commencement of the suit loses it during its progress the defendant is entitled to be absolved.*"

If, therefore, the defendant " is entitled to be absolved " where the plaintiff loses his title to the land during the progress of the action how could that relief be claimed excepting under our procedure by pleading it, and having an issue framed in respect of it. This case, therefore, is in fact an authority for the proposition that where the plaintiff in an action *rei vindicatio* loses title to the land subsequent to the institution of the action, it is open to the defendant to establish the fact of loss of title on the part of the plaintiff and to claim relief based on that circumstance. It is, however, plain to see that in such a case in regard to question of ouster and consequential damages the defendant cannot successfully evade liability to pay damages by proof of loss of title on the part of the plaintiff subsequent to the ouster. For instance, where a plaintiff, the admitted owner of property, sues a trespasser for declaration of title, ejectment and damages based upon an ouster and the plaintiff is sold up in execution

during the pendency of the action and the trespasser himself becomes the purchaser at the execution sale, it is clear that the plaintiff would be entitled to claim damages against the trespasser up to the date of divestment of his title, and it is also equally clear that the plaintiff cannot claim ejectment of the trespasser from the land. In fact, Lascelles C.J. who took part in the case cited above dealt with a case where the facts were similar to those I have set out.

In the case of *Silva v. Silva* [1], the learned Chief Justice said,

> "Now, the result of this action is, in my opinion, almost absurd. Judgment has been given for the plaintiff, and it is admitted that all the added defendant has to do, now that he has obtained his Fiscal's transfer (plaintiff's title having devolved on the added defendant by virtue of an execution sale against the plaintiff), is to bring another action and obtain a reversal of those proceedings. I cannot believe that our system of procedure contemplates a position which is so manifestly unreasonable."

It was also sought to reinforce plaintiff's contention by a reference to the principle that the rights of parties have to be determined as at the date of action. But as was observed by de Kretser J. in the case *Arulampalam v. Kandavanam* [2]

> "The rule that the rights of parties ought to be decided at the date when an action is to be instituted cannot apply to every circumstance."

In that case objection was taken to a plea of *res judicata* being put forward on the ground that it had accrued only after institution of action, but the learned judge in overruling it expressed himself thus :—

> ". . . . the doctrine of *res judicata* so far as it relates to prohibiting the re-trial 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."

That case, however, dealt with a problem somewhat different from that arising on this appeal. In the present case the question is whether the defendant not having put forward a plea accruing to him after institution of action but before judgment can in the subsequent action be permitted to rely upon the self-same plea in support of his claim.

The Privy Council laid down the law in the widest terms possible although no doubt the facts in that case show that the plea was one which in point of fact had been put forward in the earlier action, but had been abandoned at the trial.

In the case of *Sirimut Rajah Moottoo Vijaya Raganadha Bodhi Gooroo-swamy Periya Oddya Taver v. Katama Natchiar and another* [3], Lord Westbury in delivering the opinion of the Board said,

> "When a plaintiff claims an estate and the defendant being in possession resists that claim he is bound to resist it *upon all the grounds that is possible for him according to his knowledge then to bring forward.*"

[1] *(1913) 16 N. L. R. 89.*
[2] *(1939) 16 C. L. W. 5.*
[3] *11 M. I. A. (50).*

That the language used by the noble Lord is not to be limited by the facts of the case with which he was dealing is supported by the observation of Blackburn J., in the case of *Newington v. Levy* [1],

> "I am inclined to think that the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity of bringing before the Court."

In this case it is quite obvious that the present plaintiff had the fullest opportunity of bringing before the Court his claim of title to the land based upon the conveyance (P 1), for at the date he filed answer the title conveyed by P 1 had vested in him and there was nothing to prevent him from pleading that title as well. The present plaintiff not having done so and not having obtained an adjudication upon that title in the former suit, the decree in that suit must therefore be deemed to operate as *res judicata* in regard to the present assertion of his claim. For these reasons I hold the judgment of the learned District Judge is right. The appeal therefore fails and is dismissed with costs.

HOWARD C.J.—I agree.

Appeal dismissed.