1959 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

M. KRISHNAR *et al.*, Appellants, *and* K. S. THURAIRAJAH, Respondent

S. C. 590—D. C. Jaffna, 432/L

Res judicata—*Scope of rule—Applicability as between co-defendants—Action under section 247 of Civil Procedure Code—Is judgment-creditor privy of the judgment-debtor ?*

(i) A judgment-creditor instituted an action under section 247 of the Civil Procedure Code making the claimant and the judgment debtor co-defendants. A previous decree entered in favour of the claimant as against the judgment-debtor by virtue of an order of consent and without investigation of title was pleaded by the claimant as *res judicata*.

Held, that the rule of *res judicata* is applicable as between co-defendants provided only that three conditions are satisfied :—(1) There must be a conflict of interests between the defendants concerned ; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; (3) the question between the defendants must have been finally decided.

(ii) Two lands A and B together formed one allotment. In action No. 1 the plaintiffs sued the defendant for a declaration of title to land A. An order was made of consent that the plaintiffs' action be dismissed unless they paid to the defendant before a certain date the costs of a previous date of trial. Those costs not having been paid, the action was dismissed in terms of the consent order. Subsequently, in action No. 2, the same plaintiffs sued the same defendant for a declaration of title in respect of land B.

Held, that the decree in action No. 1 was no bar to the claim in action No. 2, despite the fact that the defendant had in action No. 1 claimed title to the entire land.

APPEAL from a judgment of the District Court, Jaffna.

S. Sharvananda, with *A. Nagendra*, for the plaintiffs-appellants.

Frederick W. Obeyesekere, for the defendant-respondent.

Cur. adv. vult.

July 24, 1959. H. N. G. FERNANDO, J.—

The plaintiffs in this action, stating themselves to be the Trustees of a charitable trust, sued for a declaration of title in respect of a land called " Paruththikadu and other parcels " in extent 23 lms. and 16kls. In the description set out in the Schedule to the plaint, reference is made to a land on the East of 3 lms and 2 kls alleged to be in the possession of the defendant, and it is stated that the two lands together formed one allotment.

Of the issues framed at the trial, the Judge decided only issue No. 4 :—

" Do the judgments and decrees in D. C. Jaffna cases Nos. 4853 and 10233 operate as res judicata between the parties ?"

Action No. 4853 was filed by the plaintiffs against the present defendant in September 1948 for a declaration of title to the land of 3 lms and 2 kls referred to above. On 29th August 1949 an order was made of consent that plaintiffs' action be dismissed unless they paid to the defendant before 19th October 1949 the costs of the last date of trial. These costs not having been paid, action No. 4853 was dismissed on 26th October 1949 in terms of that consent order. An appeal against the dismissal of this action was itself dismissed by the Supreme Court on 14th May 1951.

In an action No. 8342 one Muttucumaru sued the present plaintiffs (in their capacity as Trustees) on a money claim, and obtained decree. The land of 27 lms, i.e. the two allotments one of 23 lms 16 kls involved in the present plaint and the other of 3 lms and 2 kls involved in action No. 4853, was seized in execution of that decree, but the land was successfully claimed by the present defendant. Thereupon Muttucumaru instituted a section 247 action against the present defendant. He added the present plaintiffs also as defendants, stating that their title was in issue, but claiming no relief as against them. In both actions, namely in No. 4853 and the section 247 action, the present defendant set up the same title referring to a deed No. 11502 and claiming thereon the land of 27 lms, and in the section 247 action he pleaded that the decree in No. 4853 was *res judicata*. This plea was rejected in the District Court, but upheld on appeal to this Court, the judgment dismissing Muttucumaru's action being delivered by myself. It appears from the judgment that the question mainly argued was whether a judgment creditor is a privy of his judgment debtor for the purposes of *res judicata*, and that question was answered in the affirmative.

In the present action the defendant has again set up the plea of *res judicata*, relying on the dismissal of the plaintiffs' earlier action No. 4853 and of the subsequent section 247 action in which the plaintiffs had been added as defendants, and the District Judge has upheld the plea on both grounds.

It is convenient to consider first whether the decree in the section 247 action can be pleaded as *res judicata* against the plaintiffs, who were added as defendants in that action. In *Hinni Appu v. Gunaratne* [1] Canekeratne, J., sitting alone held on very similar facts that persons thus added as defendants in a section 247 action could not, by reason of the dismissal of the section 247 action, be subsequently met by a plea of *res judicata* in an action between themselves and the principal defendants in the section 247 action. He thought that the added defendants in such a case were merely formal parties, and not being necessary parties were not affected by the decree in the section 247 action : and he did not regard as material the fact that one of the added defendants had in the section 247 action given evidence in support of the case for the plaintiff in that action.

In the case just mentioned, attention does not appear to have been drawn to the decision of the Privy Council in the Indian case of *Munni Bibi v. Tirloki Nath* [2]. Of the complicated facts, it is sufficient to note the following for present purposes. A judgment creditor of one A had sued a claimant in an action corresponding to that under our section 247 ; the claimant was defendant, but the judgment debtor's heir, one Munni was joined as a defendant ; the action was successful and the judgment-creditor held entitled to realize his claim by the sale of the property seized, on the footing that the judgment-debtor had title. The property was, however, not sold in execution of that decree. Subsequently the judgment-debtor's heir, Munni, sued the former claimant, and succeeded on the ground that the earlier judgment operated as *res judicata*. The Privy Council held that the rule of *res judicata* applies as between co-defendants if three conditions are satisfied :—(1) There must be a conflict of interests between the defendants concerned ; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; (3) the question between the defendants must have been finally decided.

It will be seen that in the case before us, a claimant who was successful in the section 247 action invokes the rule of *res judicata* as against the added co-defendant in the former action, whereas in the Indian case, it is the added co-defendant who invokes the rule as against the former co-defendant. But the Privy Council judgment makes it clear that the rule would apply in the situation with which we are dealing.

Nevertheless, I hesitate to hold that the circumstances before us justify the application of the rule. It is important to note that in the case

[1] *(1946) 47 N. L. R. 415.*

[2] *(1931) A. I. R. Privy Council 115.*

before the Privy Council, there had been in the earlier decision an adjudication upon title as between the two co-defendants, so that the conditions (2) and (3) enumerated above were fulfilled. In the present case, however, the judgment of the Supreme Court in the section 247 action did not turn on the question of title as between the two co-defendants to that action. The *ratio decidendi* of the judgment was that a judgment-creditor is a privy of his debtor, and was therefore bound by the earlier decree entered in action No. 4853 between the debtor and the claimant. The "merits" as between the two co-defendants were not in fact investigated, for there was neither an adjudication on title nor a decision that the land which was the subject of the section 247 action was identical with the land involved in action No. 4853. In fact the judgment states that this latter question of identity was not put in issue in the section 247 action.

I would hold therefore that the question whether the decree in action No. 4853 operates as *res judicata* as between the present plaintiffs and the present defendant is *res integra* and has now to be determined. On this question also, the learned District Judge has held against the plaintiffs.

Two points are principally relied on by Counsel for the appellants in regard to the decree in action No. 4853 :—firstly, that the decree in that action related to a land of 3 lms and 2 kls, whereas the present action relates to a land of some 23 lms, described in the plaint in a manner which makes it clear that it does not include the land of 3 lms and 2 kls; and secondly that action No. 4853 was dismissed not on the merits but because the plaintiffs had failed to comply with the consent order for the pre-payment of costs. In regard to the first of these grounds, it is argued that the decree in action No. 4853 determined only the right to the land of 3 lms and is final between the parties only in respect of the plaintiff's alleged cause of action with respect to that land. The circumstance, it is argued, that the defendant did in action No. 4853 put forward a claim of title to a larger land does not render the decree binding as respects such larger land. Still less, it is urged, would the decree be so binding, because there was in fact no adjudication upon this issue raised by the defendant, but a mere dismissal of the action on account of the plaintiffs' default. I should add that this second point was, according to my recollection, not urged before this Court at the hearing of the appeal in the action under section 247 to which I have referred above.

It seems to me that the plaintiffs are entitled to succeed upon the second of the grounds now urged, if not also upon both such grounds. In *Samichi v. Pieris*[1], Lascelles, C.J., while upholding a plea of *res judicata* cited with approval the observations of Lord Watson in an Indian case :— "The cause of action has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour".

[1] *(1913) 16 N. L. R. 257.*

This observation was acted upon by Garvin, S.P.J. in *Ranhoti v. Singho et al.*[1] In action No. 4853 the cause of action relied on by the plaintiffs was only that a land of some 3 lms vested in them as Trustees, that the land had been leased to the defendant, and that the defendant subsequently d nied the title of the plaintiffs to that land. The cause of action now agitated by the plaintiffs is that a different land vested in them as Trustees, and that the defendant has been in unlawful possession of this different land. Upon the principle as expressed by Lord Watson, which has been approved in our Courts, it would seem clear that the decree in action No. 4853 cannot affect the subject-matter of the present action, despite the fact that the defendant had in the earlier action claimed title to the entire land. It is well that I have this opportunity at least to express serious doubt as to the correctness of the view I adopted in the judgment in the action under section 247 (S. C. 437/55, D. C. Jaffna No. L. 10233 decided on 18th July 1956).

In any event, the decree in action No. 4853 having been entered on account of the plaintiffs' default, and without adjudication upon the issues raised would be no bar to a claim by the plaintiffs to a land which was not the subject of that decree. It would only prevent the plaintiffs from again claiming as against the defendant to be vested with, or to be the lessor of, the land which was the subject of that decree.

For these reasons I would hold that the preliminary issue No. 4 should have been answered in the negative and that the case must go back to the District Court for a trial on issues 1 to 3, 6 and 7. The decree appealed from is set aside and the plaintiffs will be entitled to the costs of this appeal. The costs of the past proceedings in the District Court will abide the ultimate result of the action.

SANSONI, J.—I agree.

Decree set aside.