June 12, 1911

Present : Wood Renton J.

JAYEWEERA *v.* EDO APPU *et al.*

117—*C. R. Kalutara*, 5,555.

Res judicata—*Action for declaration of title and damages—Disclaimer of title by defendant—First action dismissed—Second action for declaration of title.*

The plaintiff sued the defendant in C. R. Kalutara, No. 5,412, for declaration of title to the land in dispute and damages. The defendants admitted the plaintiff's title ; no issue as to title was framed, and the case went to trial solely on the question whether or not the defendants were cultivating under the plaintiff any portion of the land. The plaintiff's action was dismissed. Subsequently the plaintiff brought the present action against the defendants for a declaration of title to the same land. The defendants set up a plea of *res judicata.*

Held, that the plea was bad. *Esan Appuhamy v. Louis Appuhamy* [1] over-ruled.

THE facts are set out in the following judgment of the Commissioner of Requests (T. B. Russell, Esq.) :—

I think that the plaintiff is precluded from bringing this action by reason of the result of the previous action brought by him in connection with the same land. That case is before me. It was an action between the present plaintiff and the present first defendant as sole defendant

[1] *(1907) 3 Bal. 236.*

Plaintiff in that case complained that he had given defendant a portion of his field towards the east to cultivate, but that defendant, alleging title to the portion, had appropriated the whole produce to himself. He prayed that he might be declared entitled to the land and given damages for the defendant's illegal action.

Defendant answered by denying that he ever claimed title to the plaintiff's field, and asserting that the field which he cultivated bore another name, and was the property of the present second and third defendants, who are his sons.

The issues framed were :—

(1) Did defendant cultivate four pelas of plaintiff's field ?

(2) Did he agree to give eight bags as ground rent, and if not, what damages ?

Mr. Orr maintains that these issues, taken along with the defendant's denial that he ever claimed any portion of the plaintiff's field, show that the action was decided, not as an action for title, but simply as one for rent. But this is clearly not so. The important question was undoubtedly whether the portion of land cultivated by the defendant came within the plaintiff's land. The evidence recorded in the case, and especially the Judge's judgment, show this to be so. In his judgment : "The evidence which has been placed before me is so unsatisfactory and unconvincing that I am not satisfied that defendant cultivated any portion at all, either within the boundaries of the land claimed by the plaintiff or adjoining it on the outside," and so dismissed the case. The case was in every way a land case, in which the plaintiff claimed title to a portion of land cultivated by the defendant, and defendant denied that title. The subject of dispute is now made clear by a plan of survey put in by the plaintiff, which he has had made for the present case. Lot B is the land in dispute now, as it admittedly was in the previous case. If this survey had been produced in the previous case, it would have had the result of making the case much clearer, but it obviously would not have changed the character of the case in any way. Instead of the issue, "Did defendant cultivate four pelas of plaintiff's field ? " the issue would have run in this way : " Admitting that defendant cultivated four pelas of field in lot B in the plan, does that lot form part of the plaintiff's field C ? " What plaintiff seems to me to be now attempting to do is to re-open the decree in the previous case, hoping to get it reversed on the strength of the new evidence of the survey plan. This evidence might, however, have been produced in the previous case. On the ground, therefore, that all the issues of the present case might have been raised in the previous case, and were to all practical intents and purposes so raised, I hold that plaintiff is prevented from bringing this action. His action is accordingly dismissed with costs.

Garvin, C.C., for substituted plaintiff, appellant.

A. St. V. Jayewardene, for defendants, respondents.

Cur. adv. vult.

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In this case the original plaintiff, who is now dead, sued the defendants-respondents for a declaration of title to a portion of

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land called Midigahawella, alleging that the respondents had disputed her title thereto, although they had originally entered on the land by the plaintiff's permission. In their answer the defendants-respondents denied the plaintiff's title, and set up a plea of *res judicata* by virtue of the judgment of the Court of Requests of Kalutara in case No. 5,412 of that Court. The learned Commissioner of Requests upheld that plea, and dismissed the plaintiff's action. Against that decision the substituted plaintiff has appealed. I venture to think that the Commissioner of Requests has come to a wrong conclusion in regard to the plea of *res judicata*. It is quite true that the plaintiff in case No. 5,412, who was the original plaintiff in the present action, claimed a declaration of title to the land there in suit, which is also in suit here. At the same time in that case the defendant admitted the plaintiff's title. Under those circumstances no issue as to title was framed, and the case was decided solely on the question whether or not there was sufficient evidence that the defendant had been cultivating under the plaintiff any portion of the land. In the present case, not only is a declaration of title claimed, but the plaintiff's title is denied. Under these circumstances, I do not think that any plne of *res judicata* can be successfully set up. Mr. A. St. V. Jayewardene referred me to the cases of *Ibrahim Baay, v. Abdul Rahim*[1] and *Esan Appuhamy v. Louis Appuhamy*.[2] The former of those cases can have no application to C. R. Kalutara, No. 5,412, inasmuch as the defendant denied the plaintiff's title, and set up title in himself. The latter is a decision of my own. The plaintiff had brought an action for declaration of title to a share of land. The defendants admitted the plaintiff's title in part, but as the plaintiff had failed to comply with an order of Court to bring in other co-owners as added parties, his action was dismissed, and his application to withdraw the action with liberty to bring a fresh suit was refused. I held that the plaintiff or his successors in title could not vindicate in a fresh suit even the portion of land which the defendants had admitted to be the plaintiff's in the previous suit. In support of the appeal, Mr. de Sampayo had argued that the admitted shares had never really been in issue between the parties within the meaning of the explanation to section 207 of the Civil Procedure Code, and that accordingly the decree as regards them could not operate as *res judicata*. I dealt with this argument as follows : "It appears to me that this construction is disposed of by the language of the explanation itself. The claim to these shares was a right of property capable of being put in issue, and the decree is, therefore, conclusive as regards it, whether it was actually claimed, set up, or put in issue in the action or not." On reconsideration, I do not think that the meaning which I put on the explanation to section 207 of the Civil Procedure Code in *Esan Appuhamy v. Louis*

[1] *(1909) 12 N. L. R. 177.*

[2] *(1907) 3 Bal. 236.*

Appuhamy[1] was right, and I am not prepared to follow that decision now. On the facts, as they existed in that case, an issue as regards the plaintiff's title to the admitted shares could not well have been framed, and that being so, I do not think that the title to those shares can be said to have been capable of being put in issue in that action. If my memory serves me aright, the decision in *Esan Appuhamy v. Louis Appuhamy*[1] was doubted by Mr. Justice Wendt on the same ground. I set aside the decree of the Court of Requests and send the case back for trial there. As regards the costs of the previous hearing on May 26, at which the case could not be argued owing to the absence of the record in C. R. Kalutara, No. 5,412, I have read the letter of the learned Commissioner of Requests, dated June 7, 1911. But I still think that it was the primary duty of the appellant's proctor, although no doubt a secondary duty of the same kind rested on the proctor for the respondents, to have taken steps to see that the Court of Requests record was forwarded to the Supreme Court in time for the argument of the appeal when it was listed. Under these circumstances, there will be no costs of the previous hearing to either side. The costs of the second argument, which was the real argument on the appeal, will go to the appellant in any event, as well as the costs of the argument in the Court of Requests on the plea of *res judicata*. All other costs will be costs in the cause.

Sent back.