1966 *Present :* **H. N. G. Fernando, C.J., and Samerawickrame, J.**

B. H. JAYAWARDENE, Appellant, *and* W. A. ARNOLISHAMY and another, Respondents

S. C. 507/1965—D. C. Avissawella, 10954/L

Civil Procedure Code—Section 406—Withdrawal of action—Leave of Court to bring fresh action not obtained—Effect on right of plaintiff to bring fresh action— Res judicata—*Inapplicability of such plea—Difference in effect between withdrawal of action and consent decree.*

The term " subject-matter " in section 406 of the Civil Procedure Code does not mean the property in respect of which an action is brought. It includes the facts and circumstances upon which the plaintiff's right to the relief claimed by him depends.

The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in section 406 (2) of the Civil Procedure Code. It does not, however, provide the basis for a plea of *res judicata* properly so termed, because there is no adjudication. That the decision of the questions raised in the action that was withdrawn, had it proceeded to judgment, would have been decisive in respect of some of the issues that arise in the subsequent action is of no moment if the subject matters of the actions are not the same.

Plaintiff, alleging that an act of trespass was committed on his land Godaporagahawatta by X and certain other persons who disputed his title to the land, sued the trespassers in action No. 9808 for declaration of title to the land. He later withdrew the action on 30th September 1960 without obtaining from the Court leave to bring a fresh action. The action was therefore dismissed, and, of consent, there was no order as to costs. Subsequently the plaintiff instituted the present vindicatory action against X and the 2nd defendant in consequence of a different act of trespass committed by them on the same land on 3rd March 1963. The defendants stated that the alleged trespass was committed by them on land Jambugahawatta and not on land Godaporagahawatta. They admitted plaintiff's title to Godaporagahawatta and pleaded that the plaint and decree in Case No. 9808 was *res judicata* between the plaintiff and themselves.

Held, that the subject-matter of the present action was not the same as the subject-matter of action No. 9808. The withdrawal and dismissal of the earlier action No. 9808 could not, therefore, preclude the institution of the present action by reason of the provisions of section 406 (2) of the Civil Procedure Code. Nor could the decree in that action support the plea of *res judicata* properly so termed.

APPEAL from a judgment of the District Court, Avissawella.

R. Manikkavasagar, for Plaintiff-Appellant.

Ralph de Silva, for Defendants-Respondents.

Cur. adv. vult.

December 21, 1966. SAMERAWICKRAME, J.—

The plaintiff-appellant instituted this action against the 1st and 2nd defendants-respondents for declaration of title to a land called Godaporagahawatta. In his plaint he alleged that the defendants, during the night of the 3rd March, 1963, forcibly and unlawfully entered the said land and erected a hut there.

After two surveys of the land had been made, one at the instance of either party, the defendants-respondents filed amended answer in which they stated that they were entitled to a share in a land called Jambugahawatta, which was depicted as Lots 1, 2, and 11 in Plan No. 1147/64 filed of record, and that they put up a hut on that land. They also stated that the land called Godaporagahawatta is Lots 3 to 10 in Plans Nos. 968 and 1147/64, and that they never disputed title to any portion of that land. They further pleaded that the plaint and decree in case No. 9808 was res judicata between the plaintiff and themselves.

In action No. 9808 of the District Court of Avissawella, the plaintiff appellant filed action against the present 1st defendant and some other parties claiming a declaration of title to the land called Godaporagahawatta. In his plaint, he alleged that the defendants in that case were disputing his title to the said land for the past five years, and that in spite of the protests of himself and the other co-owners, they had put up a boutique on the said land. The decree in action No. 9808 has been produced marked D2, and it shows that that action was withdrawn and was dismissed on the 30th September, 1960. No permission of Court to institute a fresh action for the subject matter of the action is stated to have been obtained.

At the trial, the following issue was raised and taken up for decision as a preliminary issue—

> " Is the decree in Case No. 9808 D. C. Avissawella res judicata between the plaintiff and the defendants in this case. "

The learned Judge made order answering the issue in the affirmative and dismissing the plaintiff's action with costs.

The question is whether the withdrawal of action No. 9808 D. C. Avissawella precluded the plaintiff from instituting the present action. Section 406 of the Civil Procedure Code states as follows :—

(1) If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff—

(*a*) that the action must fail by reason of some formal defect, or

(*b*) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned,

the court may grant such permission on such terms as to costs or otherwise as it thinks fit.

(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

The term 'subject matter' in the above provision does not, in my view, mean the property in respect of which an action is brought. In considering an almost identical provision in the Indian Code of Civil Procedure in *Aly Muhammad v. Karim Baksh* [1] Shadi Lal C.J., who was later a member of the Judicial Committee of the Privy Council, stated, "the phrase 'subject matter' is not defined in the Code but it is clear that it does not mean property, but has reference to the right in property which a person seeks to enforce". In a passage which has been cited with approval by Howard C.J. in *Kanapathipillai v. Kandiah* [2], Chitaley states, "the term 'subject matter' means the plaintiff's cause of action for his suit, and a suit for different cause of action is, therefore, not barred under this rule even though the suit may relate to the same property. Conversely, a suit based on the same cause of action as the first one is barred". I do not think that cause of action in this passage has the meaning given to that term in our Code by the definition. It is used there in a wider sense and meant both the right asserted and its denial. I am of the view that the term 'subject matter' includes the facts and circumstances upon which the plaintiff's right to the relief claimed by him depends.

In the present case, the trespass alleged is stated to have taken place on 3rd March, 1963. Action No. 9808 was withdrawn on 30th September, 1960. The trespass complained of in the present action is, therefore, one which took place over two years after the termination of the earlier proceedings. In the present case, the title of the plaintiff to the land called Godaporagahawatta is admitted and not in dispute. In the plaint in action No. 9808 (which is the only pleading in that case produced) it was alleged that the defendants had been denying the title of the plaintiff-respondent to that land for a period of five years before action. In the present case, the differences relate to identity of the corpus of the plaintiff's land without any dispute regarding the title of the plaintiff to his land; in action No. 9808 the dispute as to the title of the plaintiff is alleged. It cannot be said, therefore, that the subject matter of the present action is the same as the subject matter of action No. 9808. Accordingly, the dismissal of that action would not preclude the institution of the present action by reason of the provisions of Section 406 (2) of the Civil Procedure Code.

Learned counsel for the defendants-respondents conceded that, in any event, the dismissal of action No. 9808 could not bar the action as against the 2nd defendant-respondent as he was not a party to that case.

Learned counsel for the defendants-respondents however went further and argued that the decree in action No. 9808 was one made of consent and that it would support the plea of res judicata properly so termed.

[1] *A. I. R. 1933 Lahore 943.* [2] *(1942) 44 N. L. R. 42.*

The decree states " the plaintiff's application to withdraw the action being allowed, it is ordered and decreed of consent that the plaintiff's action be and the same is hereby dismissed without costs ".

The plaintiff who desires to withdraw his action is entitled to do so and the Court has necessarily to enter an order of dismissal. The consent of the defendants, therefore, could not have been to the dismissal of the plaintiff's action but to its dismissal without costs. I am, therefore, of the view that for this purpose the dismissal must be treated as one made in consequence of the withdrawal of the action by the plaintiff.

The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in Section 406 (2). It does not, however, provide the basis for a plea of res judicata properly so termed, because there is no adjudication. Where a partition action was withdrawn and the claims made in that action was set up again in another action brought subsequently, Justice Gratiaen said, " As there had been no formal adjudication in the earlier action regarding these competing claims, the doctrine of res judicata, in the strict sense of the term, does not apply ",—vide *57 N. L. R. page 241, at page 244.* That the decision of the questions raised in the action that was withdrawn had it proceeded to judgment would have been decisive in respect of some of the issues that arise in the subsequent action is of no moment if the subject matters of the actions are not the same.

In the case of *A. J. Judah v. Ramapada Gupta* [1], Mallick J. put the matter thus : " It would follow from what is stated before that if the cause or action which gave rise to the reliefs claimed in the subsequent suit did not arise when the previous suit was instituted and withdrawn in the sense that one important event absolutely essential to complete the cause of action in the subsequent suit did not take place, then the subject matter of the two suits must be different and 0.23, R. 1 (3) has no application. It may be that for successful determination of the suit alleged to be hit by the mischief of 0.23 R. 1 (3) questions and issues have to be decided which were substantially at issue in the previously instituted suit, but that in my judgment does not make the subject matter in the two suits to be the same. If the previous suit was decided against the plaintiff then the decisions on those issues either expressly or constructively must have been taken to have been decided against the plaintiff and the subsequent suit would fail because of the principles of res judicata embodied in S. 11 of the Code. If however the suit was not decided but merely withdrawn, no question of res judicata arises and in law the plaintiff is still entitled to agitate the question in Court. The argument advanced by Mr. Das in substance and in fact is an attempt to extend the principles of res judicata to cases in which there has been no adjudication by the Court. In my judgment, the principles of S. 11 and O. 23 R. 1 (3) are different and it is not permissible to apply the principles of res judicata to cases under O. 23 R. 1(3)."

It is true that a consent decree supports a plea of res judicata properly so termed, even though there was no adjudication by Court. This is

[1] *A. I. R. 1959 Calcutta 715 at page 723.*

because such a decree implies a decision upon the rights in dispute at the action by the parties. From the withdrawal of an action, no such decision as to the rights in dispute in the action can be implied. In fact, as pointed out by My Lord the Chief Justice at the argument, the plaintiff may withdraw his action because the defendant has made full amends in respect of the claim made by him.

The learned Judge stated in his judgment that having withdrawn the earlier action without permission to file a fresh action, the plaintiff in effect stated that he could not maintain his action for a declaration of title against the defendants. Even if the learned Judge is right in saying that from the withdrawal of this action a statement by the plaintiff that he could not maintain the action must be implied, such a statement had reference to the circumstances obtaining at the time he made it. In the present action, the title of the plaintiff to his land was not disputed and the action itself is brought upon a trespass alleged to have taken place nearly two years after the termination of the earlier proceedings. Accordingly, even if the plaintiff were unable to maintain the earlier action, it does not follow that he is precluded from bringing this present action, based as it is upon different facts and circusmtances.

There were references in the proceedings to the fact that answer had been filed in action No. 9808. No copy of the answer has however been produced. It is incumbent upon a party who makes a plea of res judicata to place before Court material necessary to show what the matters were in dispute in the earlier action and that matters in dispute in the action under consideration are the same.

Spencer Bower states " It follows that, in strictness, the burden is on the party setting up the estoppel of alleging and establishing this identity of subject matter—that is to say, that his opponent is seeking to put in controversy and re-agitate some question of law, or issue of fact, which is the very same question or issue which has already been finally decided between the same parties by a tribunal of competent jurisdiction. Where there are no pleadings or particulars, the identity must be established by evidence. "—vide The Doctrine of Res Judicata by George Spencer Bower, page 115.

It would appear therefore that the defendants-respondents have failed to place before Court the material necessary to support a plea of res judicata even if they were entitled to put forward such a plea upon the order of dismissal of action No. 9808 on an application to withdraw by the plaintiff.

I hold that the preliminary issue should have been answered in favour of the plaintiff-appellant. I accordingly set aside the order of the learned Judge and send the case back for trial in due course of law, upon the other issues that arise. The defendants-respondents will pay to the plaintiff-appellant his costs of appeal as well as the costs of the trial date, 7.9.65, on which date argument on the preliminary issue was heard.

H. N. G. FERNANDO, C.J.—I agree.

Order set aside.