1941 *Present* : **Howard C.J. and Soertsz J.**

BANDA *v.* BANDA *et al.*

13—D. C. Kandy, 21.

Res judicata—*Two sets of defendants—Conflict of interest between defendants —Final decision.*

Where there were two sets of defendants in a case between whom there was a conflict of interest and it was necessary to decide the conflict in order to give the plaintiff the relief he claimed and where the question between the defendants was finally decided,—

Held, that the judgment operated as *res judicata* between the defendants *inter se.*

Senaratne v. Perera (*26 N. L. R. 225*) referred to.

APPEAL from a judgment of the District Judge of Kandy.

Cyril E. S. Perera (with him *Gilbert Perera*), for the defendants, appellants.

H. V. Perera, K.C. (with him *S. R. Wijayatilake*), for the plaintiff, respondent.

Cur. adv. vult.

June 18, 1941. HOWARD C.J.—

The only question that arises in this case is whether the learned District Judge was right in holding that the decree in D. C. Kandy, 36,732, is *res judicata* as to the title whether by prescription or otherwise of the plaintiff and defendants. D. C. Kandy, 36,732, was instituted in 1928 by one A. M. Banda against the plaintiff-respondent for middle lot A in plan D 1. The defendants-appellants were added as defendants in the 1928 case and in their answer claimed lots C and D by prescription. There was also a fifth added defendant who claimed lot B. Although claiming title to lots C and D by prescription the appellants disclaimed title to lot A which formed the subject-matter of the action and prayed that they might be released therefrom. One of the issues for trial was the question as to what rights the parties had acquired by prescription to the land called

Panwatta *alias* Kotikabaddewatta which it was admitted was constituted by lots A, B, C, and D. In his judgment the District Judge stated that the plaintiff and the added defendants including the defendants-appellants in this case are on one side, while the defendant is on the other. Also that the contest was whether the middle block, that is to say, the land called Panwatta consisting of lots A, B, C, and D belonged to the plaintiff and the added defendants or whether it belonged to the defendant. The District Judge dismissed the action with costs. The first to fourth added defendants, appealed against this decision and in their petition of appeal submitted (*a*) that they were wrongly made parties to the action by the District Judge of Kandy as there was no quarrel between them and the defendant and (*b*) that they had acquired a title by possession. The appeal was dismissed and the judgment of the District Judge affirmed.

In the present case the plaintiff claimed that the defendants should be ejected from the land described in the schedule to the plaint of which lot D in plan D 1 formed a part and pleaded, moreover, that the matter was *res judicata* in consequence of D. C. Kandy, 36,732. It was agreed at the settlement of issues that the dispute was only as to lot D. Counsel have referred us to various decisions both of the English and local Courts. In this connection I may observe that in his judgment in *Samichi v. Pieris*[1] Lascelles C.J. stated that there was nothing in the various sections of the Civil Procedure Code dealing with *res judicata* inconsistent with the principles followed by the English, Indian and American Courts. The principles governing the application of the rule of *res judicata* was considered in the Privy Council case of *Mt. Munni Bibi and another v. Tirloki Nath and others*[2]. After laying down the general principle that a decision is not *res judicata* as between co-defendants, Sir George Lowndes stated that this principle was subject to exceptions and proceeded to set out the three conditions which the Board adopted as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants. Those conditions are as follows:—

(1) There must be a conflict of interest between the defendants concerned;

(2) It must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and

(3) The question between the defendants must have been finally decided.

In formulating these three conditions Sir George Lowndes was apparently following the law as laid down in the following passage from the judgment of the Vice-Chancellor (Sir James Wigram) in *Cottingham v. Earl of Shrewsbury*[3];—

"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

[1] *16 N. L. R. 257.* [2] *A. I. R. 1931 P. C. 114.*

[3] *67 E. R. at p. 535.*

The question of the right of a Court to investigate claims by one co-defendant against another was also considered by the Court of Appeal in *Kevan v. Crawford* [1]. In this connection I would refer to the following passage from the judgment of Jessel M.R. :—

> "What right has a Court of Justice to investigate a claim by title paramount by one co-defendant against the other? I am not aware of any. The answer is, if you wish to assert these claims you must assert them in a proper action. But it was said, and the Vice-Chancellor acceded to that view, that whatever decision principle might call on us to make, authority was the other way. I certainly was surprised to hear it; and I was not surprised to find when the authorities were referred to that they were authorities of a totally different class. The authorities referred to were of this sort :—That where a plaintiff obtains relief against one or more defendants, and there are subordinate questions either necessary to be gone into to work out that relief completely for the benefit of the plaintiff, or necessary to adjust the rights of the defendants consequent on the relief so obtained by the plaintiff, the Court may by inquiries in Chambers work out the equities between the co-defendants. But there is no case produced in which any such inquiries were directed where the plaintiff's case wholly failed."

The authorities on the application of *res judicata* were given careful consideration by Jayawardene A.J. in *Senaratna v. Perera* [2]. The principle laid down by him is stated by him in the following terms :—

> "In my opinion, formed after a careful examination of the authorities on the subject, the principle that a decision is not *res judicata* between co-defendants is subject to two exceptions :
>
> (*a*) When a plaintiff cannot obtain the relief he claims without an adjudication between the defendants, and such an adjudication is made, the adjudication so made is *res judicata* not only between the plaintiff and the defendants but also between the defendants.
>
> (*b*) When adverse claims are set up by the defendants to an action, the Court may adjudicate upon the claims of such defendants among themselves, and such adjudication will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants.
>
> Provided that in either case the real rights and obligations of the defendants *inter se* have been defined in the judgment."

As pointed out by me in *Jayasundera v. Andris* [3] there appears to be some inconsistency between the criterion laid down by Sir George Lowndes in the Privy Council and the two exceptions referred to by Jayawardene A.J. in *Senaratna v. Perera* (*supra*). Sir George Lowndes states that a condition precedent to the application of the rule of *res judicata* as between co-defendants is that it must be necessary to decide the conflict of interest between such co-defendants to give the plaintiff the relief he claims. On the other hand Jayawardene A. J. in exception (*b*)

[1] *6 Ch. D. 29.*

[2] *26 N. L. R. 225.*

[3] *41 N. L. R. 569.*

states that, provided the real rights and obligations of the defendants *inter se* have been defined in the judgment, when adverse claims are set up by the defendants to an action, the Court may adjudicate upon the claims of such defendants among themselves and such adjudication will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants. In exception (2) it is not therefore laid down as a condition precedent that it must be necessary to decide the issue between the co-defendants to give the plaintiff the relief he claims. Moreover the law as laid down in exception (2) appears to conflict with the dictum of Sir George Jessel in *Kevan v. Crawford* (*supra*).

In order to reconcile the apparent inconsistency between the two authorities to which I have referred it is, therefore, necessary to have reccurse to the text books and other authorities. The subject receives exhaustive treatment at pp. 170-176 of Hukm Chand's treatise on the law of *res judicata*. He proceeds in paragraph 77 to lay down the principle to which I have already referred that a decision in a suit does not operate as *res judicata* against all the parties to the suit, but only against those between whom the matter adjudicated upon was in issue. It is on the same principle that parties to a suit are held not to be bound by a decision in it, in a subsequent suit between them, unless they were at arms length and on opposite sides in the former suit. In paragraph 78, however, the learned author states that the mere circumstance of any persons having been formally arrayed on the same side is immaterial, and it is agreed upon now, that they will be estopped by a decision on a matter, which was actively in issue between them, and as to which they had an active controversy against each other. Decisions of various Indian Courts are then sited in support of this principle. It is only necessary to mention three of these cases. In *Shaal Khan v. Amin-ullah Khan*[1] Duthoit J. stated as follows :—

> "Both parties to the present suit were parties to the former one ; and although in the former they nominally stood together in the same array, yet as a fact they were opposed to each other, S, being on the side and supporting the case of his mother, the plaintiff, and A being the true defendant in the case."

So also Cunningham J. in *Bissorup v. Gorachand*[2] stated as follows :—

> "There can be no doubt, that though the present plaintiffs were joined as defendants in the former suit, they were practically supporting the case of the plaintiff and had the fullest opportunity of contesting the point which that suit decided, a circumstance which is proved by their being joined as respondents in the appeal. In these circumstances, the plaintiffs are debarred under section 13 from now again contesting the same point with the parties to the former suit."

The following passages from the judgment of West J., in *Ramachandra v. Narayan*[3] is also in point :—

> "Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between

[1] *I. L. R. IV All. 92.* [2] *I. L. R. IX Cal. 120.*
[3] *I. L. R. XI Bom. 216.*

the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group."

Having stated the law it now remains to apply its principles to the present case. Are the conditions formulated by Sir George Lowndes in *Mt. Munni Bibi v. Tirloki Nath* (*supra*) based on the decision in *Cottingham v. Earl of Shrewsbury* (*supra*) and followed in various Ceylon and Indian cases established ? There was in D.C. 36,732, clearly a conflict of interests between the first defendant, the respondent in this appeal, and the added defendants, of whom two are appellants in this appeal. The appellants, in D.C. 36,732 claimed lots B, C, and D, which was part of the land called Panwatta, through Ukku Banda. The plaintiff in that action claimed lot A through the same person. The respondent, however, claimed the whole of Panwatta, that is to say lots A, B, C, and D, through one Medduma Banda Basnayake Nilame. The plaintiff in D. C. 36,732 could, therefore, only succeed if Panwatta belonged to Ukku Banda. If it belonged to Medduma Banda Basnayake Nilame he failed. The defendant and added defendants though formally arrayed on the same side were at arms length and in fact it was a case of the plaintiff and added defendant being on one side and the defendant on the other. It was therefore necessary for the establishment of the plaintiff's case to decide between the conflicting claims of the defendant and added defendants. The issues were as follows :—

"1. Was Ukku Banda the owner of Panwatta *alias* Kotikabeddewatta or was Medduma Banda Basnayake Nilame the owner thereof ?

2. What rights have the parties acquired by prescription ?"

These issues were answered as follows :—

"1. Medduma Banda Basnayake Nilame.

2. Plaintiff and added defendants have failed to establish title by prescription to the land."

In view of his findings on these issues the trial Judge dismissed the plaintiff's action with costs. He also ordered the added defendants, including the two appellants in this appeal, to pay costs to the defendant, the respondent in this appeal. The added defendants appealed to the Supreme Court against this order and their appeal was dismissed, the order of the lower Court being affirmed.

I am of opinion that this case, so far as the question of *res judicata* is concerned, cannot be distinguished from *Mt. Munni Bibi v. Tirloki Nath* (*supra*). The conditions formulated by Sir George Lowndes in the latter case are satisfied in this case. There was a conflict of interest between the defendants concerned. It was necessary to decide this conflict in order to give the plaintiff the relief he claimed and the question between the

defendants was finally decided. I have, therefore, come to the conclusion that the learned District Judge was right in holding that the matter was *res judicata.*

In view of the foregoing judgment, the judgment of the District Court is affirmed and the appeal is dismissed with costs. This order is without prejudice to the defendants-appellants right to claim compensation for improvements effected to the property in question since the decree in the earlier action.

SOERTSZ J. —I agree.

Appeal dismissed.