1941 *Present :* **de Kretser** and **Wijeyewardene JJ.**

VELASIPILLAI *v.* KANAPATHIPILLAI.

258—D. C. Jaffna, 152.

Res judicata—*Priciple to be applied—Matter directly and substantially in issue in previous case—Provisions of Civil Procedure Code not exhaustive.*

The decision of a Court upon a matter, which has been directly and substantially in issue between the parties will operate as *res judicata* in a subsequent action.

The provisions of the Civil Procedure Code are not exhaustive of the law of *res judicata* in Ceylon.

***Appuhamy v. Punchihamy* (17 N. L. R. 271) and *Rowena Umma v. Pathumma Umma* (41 N. L. R. 522) distinguished.**

APPEAL from a judgment of the District Judge of Jaffna.

N. Nadarajah for 4th and 5th defendants, appellants.

L. A. Rajapakse, for plaintiffs, respondents.

Cur. adv. vult.

July 24, 1941. DE KRESTER J.—

One Kander Subramaniam was married to one Kanthipillai and had two children named Ponnachipillai and Thinagaranather. The latter was the father of one Rajasekaram, who brought an action in the Court of Requests, Point Pedro, No. 25,417, against his aunt Ponnachipillai and her husband to have a certain land partitioned. In a pedigree which he invoked appear certain names, and it is said that this document should be read as indicating that the land belonged to Kanthipillai by right of inheritance. Certain parties intervened to claim rights. Their position was that the land belonged to Subramaniam and not to his wife Kanthipillai, and they alleged that Subramaniam had contracted another marriage with one Alvattai by whom he had two children, Sanmugam and Eledchimipillai, two of the added defendants. The original parties in that case alleged that these two persons were not children of the Subramaniam who married Kanthipillai. At the trial issues were stated as follows:—

(1) Are the 2nd and 3rd added parties the legitimate children of Kander Subramaniam along with the 2nd defendant and the father of the plaintiff (*i.e.*, Ponnachipillai and Thinagaranather) ?

(2) Are the 2nd and 3rd added parties children of another Kander Subramaniam by one Alvattai ?

The trial Judge answered the first issue in the negative and the second in the affirmative. He also held on prescriptive possession and ordered a partition. He did not decide whether the land belonged to Kanthipillai or to Subramaniam. The added defendants appealed, and this Court held that the evidence in support of the alleged second marriage was most unsatisfactory and dismissed the appeal with costs.

The plaintiff in the present case traces his title from Ponnachipillai, and the issue was raised whether the decree in C. R., Point Pedro, No. 25,417, operated as *res judicata*. The trial Judge held that it did, and the appeal is from that order. Before us it was argued that the earlier decree was not *res judicata* for two reasons, viz., (*a*) that there were two questions which arose in that case, one of them being whether the land belonged to Kanthipillai, and as the decision of that question in the plaintiffs' favour was sufficient to deprive the added defendants of their rights, any decision on any other points was only incidental; (*b*) that where there are two grounds on which a court decides a case, the finding which in logical sequence of issues was the first—if such finding rendered decision on other issues unnecessary—was the finding which operated as *res judicata*. We were referred to the case of *Appuhamy v. Punchihamy* [1] and of *Shib Charan Lal v. Raghu Nath* [2].

The facts of this case are materially different from those of *Appuhamy v. Punchihamy*. In that case the Court's decision on a question of legitimacy meant the dismissal of plaintiff's action and the Judge proceeded to say that there was another ground for dismissal. Quite clearly he had arrived at the conclusion that the action should be dismissed and adjudication on any further issue was therefore unnecessary and really *obiter*. The argument on appeal proceeded on the footing that the Judge had dismissed the action on both grounds and it was sought to ascertain which ground should operate as *res judicata*. It was held that the plaintiff had first to establish his status before any other question needed attention. We need not stop to discuss the question whether this was a satisfactory way of dealing with the matter. In the present case the evidence before us is that the decree in the Court of Requests case was not based on two grounds but substantially on one ground only. There is no uncertainty as to the gound on which the decree was based. But that does not conclude the matter, for in order to arrive at his ultimate decision there were substantial issues which the Judge had to decide and they all formed the media on which his decree was founded. He had to decide, no doubt, whether the land belonged to Kanthipillai, but in addressing himself to that question he had to consider the contention that it belonged to Subramaniam, and in considering that contention it was necessary to decide the status of the persons who raised it. Their status therefore came well to the forefront. That was how parties understood the matter and that was how they presented their case. It was not a matter which was decided incidentally but one to which the parties devoted almost their whole attention. From the point of view of the original parties in that case it mattered little whether the land belonged to Kanthipillai or to

[1] *17 N. L. R. 271.*

[2] *I. L.R. 17 All. 174.*

Subramaniam. The vital question was whether the claimants also were the children of Subramaniam.

We were also referred to the case of *Rowena Umma v. Pathuma Umma*[1]. That case does not help the plaintiff for there, although the Court incidentally held in favour of the plaintiff on a question of registration, it held against her on another point and dismissed her action. The main issue was whether she could maintain the action and once that was decided against her it was unnecessary to decide any other point. No party against whom an adverse decision was made could appeal once the plaintiff's action had been dismissed.

Having dealt with the contentions raised by appellants' Counsel, I venture to say that they arise from an inadequate conception of the law of *res judicata*. It has always been the policy of the law that there should be an end of litigation : *interest reipublicae ut sit finis litium*. The same idea finds expression in the maxim *Nemo debet bis vexari pro una et eadem causa*. Once therefore parties have been at issue regarding a matter, the decision on that matter should be final, but as the consequences are so serious it is necessary to make sure that the attention of the parties and of the Court was directed to that particular matter and that it did not receive consideration only incidentally.

In India, section 11 of the Indian Code of Civil Procedure states that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties". (I give only a portion of the section.) What is required is that the matter should have been *directly and substantially in issue*. The section is dealt with by Sarkar in the 1934 edition from page 91 onwards. He quotes decisions in support of his statement that the doctrine of *res judicata* should be liberally construed, and that it is the spirit of the law and not its letter which should be the governing factor, the soul of the rule rather than its outward form. He also says that it is not necessary that the finding should form the basis of the decree in the former suit, though it may be one of the matters to be considered in deciding whether the matter has been directly and substantially in issue in the previous suit. He expresses the opinion that the question has to be determined *not* on a consideration whether the controverted point was essential or necessary to the decision of the former suit but on the question whether the matter was directly and substantially in issue in the former suit ; and he points out that the word *substantial* has not such a stringent signification as the word "essential" or the word "necessary". He goes on to say that no invariable rule can be laid down as to what is a substantial question except that if the parties by their conduct of the litigation clearly treated it as a substantial question and if the Court also treated it as a substantial question, it would be almost conclusive to show that the question was substantially in issue. *Ramaswamy v. Vanamamalai*[2] and *Muhammad Abdul Adir v. Jnanchandra*[3] are quoted in support of the proposition that parties and the Court may elevate what was originally ancillary or incidental to the position of being a direct and principal issue in the case. These cases are not available locally.

[1] *41 N. L. R. 522.* [2] *26 I. C. 873.* [3] *32 I. C. 738.*

Sarkar also quotes authority for the proposition that if in a previous suit a Court, having a question before its mind and specially brought to its notice by a party or put in issue without protest and upon which evidence is led, decides such an issue, that decision will operate as *res judicata.*

The decisions of the Indian Courts may or may not be influenced by the terms of their Code, but I have quoted sufficiently to show the very broad principles upon which a number of these decisions have been founded. Section 11 of the Indian Code has been held not to be exhaustive of the doctrine of *res judicata.* Similarly our code has been held not to be exhaustive of the law of *res judicata.*

In *Dingiri Menika v. Punchi Mahatmaya* [1], Wood Renton J. expressed the opinion that our code was not exhaustive of the subject. In *Samichi v. Pieris* [2], the same view was expressed by Lascelles C. J. and Wood Renton J., Pereira J. dissenting. Lascelles C. J. said (p.261) . . . . . "The law of *res judicata* has its foundation in the Civil Law, and was part of the Common Law of Ceylon long before Civil Procedure Codes were dream of. But even if these sections do contain an exhaustive statement of the law on this point, I cannot see that there is anything in them which is inconsistent with the principles which have been followed in the English, Indian, and American Courts". In *Senaratna v. Perera* [3] Jayawardene J. considered the question as to when a decision can be *res judicata* between defendants and stated the circumstances in which such a plea would prevail. He too thought that our code was not exhaustive on the subject and quoted his own judgment in the case of *Velupillai v. Muttupillai* [4] where he said—"Generally speaking estoppel by *res judicata* may arise either where there is identity of 'cause of action' or where there is identity of 'point in issue'".

There can be no doubt but that the question of legitimacy was prominently before the minds of the parties in the earlier action, and that it was prominently before the minds of both the lower Court and this Court on appeal. Parties deliberately put it as a matter *directly and substantially in issue,* and it was so in fact. It would be a violation of the essential principles of *res judicata* if we were to hold that that question is not now *res judicata.* In our opinion the appeal fails and must be dismissed with costs.

There is also an application for *restitutio in integrum* made by the appellants. It appears that at the trial they came to a settlement regarding a part of the land in dispute because they believed that the decree in the Court of Requests case would operate as a bar in favour of some parties. Having decided to appeal they wished to be relieved in the event of their succeeding on their appeal. They have failed and therefore their application must be dismissed. This does not mean that the application had otherwise any merit in it.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.

[1] *13 N. L. R. 59.*
[2] *16 N. L. R. 257.*
[3] *26 N. L. R. 225.*
[4] *25 N. L. R. 261.*