

1940

Present : Keuneman and Nihill JJ.

ROWEENA UMMA *v.* RAHUMA UMMA.

175—D. C. (Inty.) Galle, 37,600.

*Res judicata*—Two issues raised in previous action—Action dismissed—Decree of dismissal not based on issue raised in second section—Plea of *res judicata* not valid.

The defendant in this action brought a partition action (D. C. Galle, 35,693) in respect of the same premises making the plaintiff in this action the first defendant. The latter pleaded (1) that the plaintiff in that action could not maintain an action for partition as the plaintiff claimed a life-interest in respect of the whole of the premises, (2) that the deed in her favour prevailed by reason of prior registration over the deed in favour of the plaintiff in that action.

The Court dismissed the partition action on the first ground and held against the first defendant, the present plaintiff on the second ground.

In the present action the defendant (the plaintiff in the previous action) raised the same question of registration against the plaintiff (the first defendant in the previous action).

*Held*, that the plea of *res judicata* on the issue of registration could not be maintained as the decree in the former action was not based upon it but was made in spite of it.

**A** PPEAL from an order of the District Judge of Galle.

N. Nadarajah (with him U. A. Jayasundere and A. C. Alles), for defendant, appellant.

H. V. Perera, K.C. (with him E. B. Wikremanayake), for plaintiff, respondent.

*Cur. adv. vult.*

June 25, 1940. KEUNEMAN J.—

In this case, the learned District Judge has decided in favour of the plaintiff two issues, which were tried as preliminary issues, namely,—

“ (5) Is the plaintiff's claim barred by judgment and decree in case No. 35,693 of this Court ?

“ (6) Is the plaintiff's claim barred by judgment and decree in case No. 18,215 of the Court of Requests of Galle ? ”



This action was brought by the plaintiff, Roweena Umma, against the defendant, Rahuma Umma, for declaration of title to the premises in the schedule to the plaint, damages, and costs.

The original owner of the premises was Mohamadu Cassim. By his registered deed No. 2,247, D 2 of August 9, 1922, Cassim conveyed the entirety to his son Mohamed Saheed, who died, and whose estate was administered in D. C. Galle, No. 7,747. By his last will, Saheed devised the premises to his children, subject to a life-interest in favour of his widow, the plaintiff. Probate of his will has been obtained.

By an earlier unregistered deed, No. 4,041, D 1 of September 29, 1911, the original owner, Cassim, donated the premises to his daughter, Maharoofoa Umma, reserving a life-interest in favour of himself and his wife, the defendant. Maharoofoa Umma died leaving as her heirs her father and mother, namely, Cassim and the defendant. Cassim also died subsequently. On this title, the defendant claimed a life-interest over the entirety of the premises in addition to the one-third share which devolved on her on the death of Maharoofoa Umma. The defendant prayed for a dismissal of the plaintiff's action.

On March 11, 1937, the present defendant instituted a partition action, D. C. Galle, No. 35,693 (D 3), in which the present plaintiff was the first defendant. The points in dispute were set out as follows:—

“ (1) Does deed No. 2,247 (the present deed D 2) gain priority over deed No. 4,041 of 1911 (the present deed D 1) ?

“ (2) Can plaintiff (i.e., the present defendant) maintain this action as she claims the life-interest in the entire land ? ”

In his judgment, the learned District Judge held (1) that the plea of prior registration failed, but (2) that, as the entirety of the life-interest was vested in the plaintiff in that case (namely, the present defendant), there was no common possession entitling her to bring the partition action. The action was, therefore, dismissed with costs.

The plea of *res judicata* now raised in this case is based upon the finding of the District Judge with regard to point (1).

In the second case, C. R. Galle, No. 18,215 (D 4), the plaintiff, together with the executor of the last will of Saheed, sued one Siman Fernando in a tenancy case. Siman Fernando alleged that he was the tenant of the present defendant, who was also added as a defendant. The Commissioner held in favour of the plaintiff, but on appeal this judgment was set aside and the plaintiff's action was dismissed. The judgment of the Supreme Court is before us and it is clear that the only point decided was the question of fact, namely, that Siman Fernando was the tenant of the defendant and not of the plaintiff. I do not think that there is any plea of *res judicata* arising out of this case, which is available in the present proceedings. The appeal, in so far as it relates to issue No. 6, must fail.

I shall now consider the plea of *res judicata* in connection with the judgment and decree in D. C. Galle, No. 35,693 (issue No. 5).

It is clear that in that case the present defendant's action was dismissed with costs. But Counsel for the appellant contends that, inasmuch as the first point decided in that case (namely, the question of prior



registration), was determined in favour of the present defendant, she is entitled to claim for that finding the virtue of *res judicata*.

There is very strong authority in Indian cases for the following proposition :—

“ Any issue decided by a Court in favour of the plaintiff whose suit is ultimately dismissed on another ground, cannot operate as *res judicata* as against the defendant in a subsequent suit. A finding cannot be conclusive against a party if the decree was not based upon it, but was made in spite of it ”—*vide Parathnath v. Rameshwar*<sup>1</sup>—which is, as far as I know, the latest of a series of cases to the same effect.

In this connection, the case of *Midnapur Zamindari Co., Ltd. v. Naresh Narayan*<sup>2</sup> decided by their Lordships of the Privy Council is of interest. In that case, action was brought claiming possession against certain tenants, who pleaded (1) an occupancy right, and (2) that the suit was premature. It was held that there was no occupancy right, but that the suit was premature. The appeal by the plaintiff failed, but the tenants also filed a cross-appeal against the finding that there was no occupancy right, which also failed. Lord Dunedin in his judgment said :

“ Their Lordships do not consider that this will be found an actual plea of *res judicata*, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them . . . . ”.

Counsel for the appellants depended on the case of *Niamut Khan v. Phadu Buldia*<sup>3</sup>, which is not consistent with the cases I have mentioned, but we have it on the authority of Hukm Chand—*Res judicata*, Art. 66, p. 47—that this case was not generally followed, and has been expressly dissented from.

In the case, D. C. Galle, No. 35,693, the plaintiff's action was dismissed with costs. There was accordingly no scope for the defendant to appeal from the judgment or decree. There was no question which arose owing to the defendant being deprived of her costs in consequence of the determination of any issue against her.

We have, therefore, no occasion to consider whether any plea of *res judicata* can arise on any such order. Further, in consequence of the nature of a partition action, no question can arise of two distinct findings, namely, one relating to declaration of title, and another to other forms of relief, such as damages. The action, D. C. Galle, No. 35,693, was an action for partition or sale, and no decree could have been obtained for declaration of title. The second point raised in the case, namely, that the plaintiff, who had pleaded that she had the entirety of the life-interest could not institute a partition action, was fatal to the plaintiff's case. That was the first obstacle that the plaintiff had to overcome, although in point of fact the District Judge considered it second. It is clear that no declaration to the effect that the plaintiff had the entirety of the life-interest could have been obtained in a partition action.

In this connection I shall deal with the case cited for the appellant, namely, *Shoe Machinery Co. v. Cutlan*<sup>4</sup>. In that case, a patentee

<sup>1</sup> (1938) *Allahabad* 491.

<sup>2</sup> *A. I. R.* (1922) *Privy Council* 241.

<sup>3</sup> *I. L. R.* 6 *Calcutta* 320.

<sup>4</sup> *L. R.* (1896) 1 *Ch. D.* 667.



claimed damages for an infringement of a patent, and an injunction. The plaintiff alleged (1) that the patent was valid, and (2) that there had been an infringement. The Court, after hearing evidence, decided (1) that the patent was valid, and (2) that there had been no infringement. On the footing of both issues having been raised and determined, the Court dealt with the question of costs, giving costs to the plaintiff on the first issue, and to the defendant on the second issue, and ordering that there should be a set-off. In the circumstances, Romer J. held in a later proceeding that the finding relating to the validity of the patent was *res judicata*. This was a case where the Court had jurisdiction to enter a separate declaration of validity, and the fact that there was no separate declaration did not prevent the plea of *res judicata* being upheld, where in substance the question of validity was heard and determined and costs had been awarded on the footing of that finding.

For the reasons I have previously given, I do not think the present case is on all fours with that decided by Romer J. I think the decree in D. C. Galle, No. 35,693, was not based upon the finding on the question of registration, but was made in spite of that finding. Further, the plaintiff's action having been dismissed with costs, there was no occasion for the defendant to go further against her.

We have been referred to the form in which the decree has been drawn up, namely, "as the life-interest in the entirety with respect to boutique and premises bearing assessment Nos. 44 and 42, and now No. 41, . . . is vested in the plaintiff together with a one-third share of same, this action is not maintainable, and the same is hereby dismissed with costs." I do not think this carries the case any further, as it was not competent for the Court in the partition proceedings to make any such declaration, in particular as to the life-interest in the entirety of the premises. I think the plea of *res judicata* fails, and the appeal must be dismissed with costs. The case is sent back for the trial of the remaining issues.

NIHILL J.—I agree.

*Appeal dismissed.*

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