1964 *Present :* **Tambiah, J., and Sri Skanda Rajah, J.**

D. P. D. KARUNARATNA and others, Appellants, *and* W. D. AMARISA, Respondent

S. C. 25/62 (Inty.)—D. C. Kurunegala, 767/P

Res judicata—*Jurisdiction of Court—Distinction between want of jurisdiction and exercise of jurisdiction—Right of parties by consent to waive objections to procedure—Testamentary action– Issue of heirship—Jurisdiction of Court to decide it with consent of parties—Binding force of decision on the parties and their successors in title—Civil Procedure Code, s. 741.*

Provided there is no inherent want of jurisdiction in the Court with regard to the person or the subject-matter, parties can, if they do not cause any violent strain upon procedure, arrange their own procedure by consent and give jurisdiction to the Court to adopt that procedure, although such procedure is not prescribed by any of the provisions of the Civil Procedure Code.

Accordingly, in a testamentary action, it is competent for the Court to decide a question of heirship presented to it with the consent of the parties. In such a case, the order of the Court, even if it " could not have been made under any of the provisions of the Civil Procedure Code governing testamentary suits ", would operate as *res judicata* as between those who subsequently claim through the parties.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *T. B. Dissanayake*, for the 2nd to 8th Defendants-Appellants.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the Plaintiff-Respondent.

Cur. adv. vult.

February 24, 1964. TAMBIAH, J.—

The facts relevant to this appeal are set out in the judgment of my brother Sri Skanda Rajah with whose conclusions I agree. Since an important point of law was raised by the appellants' counsel, I wish to make a few additional observations.

The doctrine of *Res Judicata*, based on the two Latin maxims " *Nemo debet vis vexari pro una et eadem causa* " and " *Interest republicae ut sit finis litium* ", is a plea which bars subsequent action on the same cause of action between the same parties on the ground that the matter has been judicially determined and is a safeguard against unnecessary litigation over the same matter. The doctrine operates when the following essentials are present :—

(1) There must be a judgment of a court of competent jurisdiction (*Ibrahim Baay v. Abdul Rahim* [1]).

(2) There must be a final judgment (*Fernando v. Menika* [2]).

(3) The case must have been decided on its merits (*Annamalai Chetty v. Thornhill* [3]).

(4) The parties must be identical or be the representatives in interest of the original parties (*Sivakolunthu v. Kamalambal* [4]).

(5) The causes of action must be identical (*Dingiri Menika v. Punchi Mahatmaya* [5]).

In the instant case, the order made in D. C. Kurunegala Case No. 1503 T operates as *Res Judicata* on the issue as to the heirship of Poola. The parties to the proceedings in that case were " Elmali ", the predecessor in title of the plaintiff and the first defendant, and " Bali ", the predecessor in title of the second to eighth defendants in the instant case, and one Horatale. Bali, who was a minor at that time, was duly represented by a guardian-ad-litem.

Mr. Jayewardene, the appellants' counsel, contended that the District Court of Kurunegala had no jurisdiction to decide the issue in D. C. Case No. 1503 T. Want of jurisdiction should be clearly distinguished from the wrong exercise of jurisdiction. Whenever a decision is found to be wrong in law or violates a rule of procedure, the Court which delivered such a decision cannot be regarded as incompetent to deliver such a decision (vide the observations of Wijeyewardene J., in *Haniffa v. Cader* [6]). In the words of Sir Asutosh Mookerjee, A. C. J., in *Hriday Nath Roy v. Ram Chandra Barna Sarma* [7]: " Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly . . . . " (cited with approval by Gunasekara J., in *Weerasooria v. Controller of Establishments* [8]).

Mr. Jayewardene relied on a dictum of Macdonell C.J., in the case of *Sinniah v. Murugesu* [9] in support of his contention. But the *ratio decidendi* in that case was that the order relied upon did not give rise to a plea of *Res Judicata* as it was vague and did not conclusively decide the

[1] *(1909) 12 N. L. R. 177.*
[2] *(1906) 3 Bal. 115.*
[3] *(1932) 34 N. L. R. 381.*
[4] *(1953) 56 N. L. R. 52.*
[5] *(1910) 13 N. L. R. 59.*
[6] *(1941) 42 N. L. R. 403 at 406.*
[7] *A. I. R. 1921 Cal. 34.*
[8] *(1949) 51 N. L. R. 189 at 191.*
[9] *(1935) 3 C. L. W. 134.*

matter in issue. In an *obiter dictum*, Macdonell C.J., observed that, apart from the provisions of section 741 of the Civil Procedure Code, there are no other provisions in the said Code empowering a court, in testamentary proceedings, to decide questions of title to immovable properties. Mr. Jayewardene conceded that in judicial settlement proceedings, in an appropriate case, the court exercising testamentary jurisdiction may find it necessary to decide on title to immovable property. Thus, for example, in accounting for mesne profits, questions of title may be gone into.

In the instant case, the mere fact that at an earlier stage of the testamentary proceedings the question of heirship was decided did not deprive the court of its inherent jurisdiction to hear this matter.

In D. C. Kurunegala Case No. 1503 T., the parties invited the Court to decide on the issue as to the heirship of Poola. Where the Court does not suffer from an inherent want of jurisdiction with regard to the subject-matter before it or with regard to the persons, parties should be held bound to the agreement that questions between them should be heard and determined in proceedings quite contrary to the ordinary *cursus curiae* (vide *Hriday Nath Roy v. Ram Chandra Barna Sarma* (supra) at page 687).

" Departures from ordinary practice by consent are of everyday occurrence " said Sir Molagne Smith, in delivering the opinion of the Privy Council in *Pisani v. The Attorney-General for Geballi* [1] " but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that the court of appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal ".

In the instant case, I am of the view that the learned District Judge has correctly decided the issue of *Res Judicata*. The appeal is dismissed with costs.

SRI SKANDA RAJAH, J.—

This is an appeal in an action for the partition of the land called Kongahamulahena depicted as lots 1, 2 and 4 in plan No. 1529 of 27.1.1960 (X) brought by the Plaintiff-respondent allotting to himself and the Defendant-respondent a half share each. The 2nd to 8th Defendants-appellants intervened claiming the entire corpus for themselves, on the basis that each of them was entitled to a one-seventh share, and prayed that the Plaintiff's action be dismissed.

Admittedly the land in question was the acquired property of one Poola, a Kandyan, by virtue of Settlement Order 676 (2D1). The law of inheritance applicable in this case is the Kandyan Law.

[1] *30 Law Times 729 at 730.*

Poola's mother was Elmali. Poola was married to one Horatali and they had a son named Baiya, who predeceased Poola, but left behind his mother, Elmali and an illegitimate daughter named Bali, whose children are the 2nd to 8th Defendants-appellants.

The Plaintiff and 1st Defendant claim through Elmali, on the footing that it was she who inherited her son Poola's acquired property by reason of " daru urume ". The appellants rely on the case of *Appuhamy v. Lapaya* [1], where it was held that under the Kandyan Law where a person dies intestate leaving both legitimate and illegitimate children, his acquired property is divided equally between them, for their contention that it was Bali, and not Elmali, who inherited Poola's acquired property.

It would not become necessary to decide which of these two contentions is right if the plea of *res judicata*, on which the plaintiff relies, prevails. In order to consider this plea it is necessary to set down certain facts in some detail.

On 2.4.1917 Horatali applied for letters of administration in respect of the estate of her late husband Poola in D. C. Kurunegala, Case No. 1503 (Testamentary) (P1) alleging that she and Bali were his heirs. She prayed that Elmali be appointed guardian-ad-litem of the minor Bali. (In view of the fact that certain necessary documents in the testamentary case had not been produced at the trial of this case the original record of that case was called for and examined on the last day of argument. I shall refer to some of them in due course.)

On 7.3.1918 Elmali filed an affidavit in which she alleged that Horatali was harassing her and was not allowing her to possess a half share of certain lands. On 13.6.1918 she filed an affidavit (P3) in which she averred : " The deceased Poola whose estate is being administered in the above case had a son who predeceased him leaving an illegitimate child Bali. I am the sole heir at law of Poola and I am entitled to his property by right of daru urume subject to the life-interest of the petitioner in the acquired property of Poola ". In view of this Hapuwa Velduraya was, with his consent, appointed guardian-ad-litem of the minor Bali. (This is borne out by the journal entry of 13.6.1918. Hapuwa Velduraya's proxy granted on 8.10.1918 to proctor Samuel Munasinghe is in the record.) On 16.12.1918 parties were present and an inquiry was held. Bali (through her guardian-ad-litem) was represented by Mr. Munasinghe, Proctor. The administratrix was represented by her proctor Mr. Gomis. The issue framed was : " Whether Bali is an heir ? " The lawyers were heard and the learned District Judge delivered his order (P6) on 13.1.1919 holding that " Elmali is the heir of Poola . . . . ".

It is submitted for the appellants that this is in conflict with the decision in the 8 N. L. R. case (*supra*) and is not in accordance with the law. On behalf of the plaintiff it is submitted that even if this finding of the District Judge was wrong in law it operates as *res judicata*. The appellants seek to meet this submission with the argument that the District

[1] *(1905) 8 N. L. R. 328.*

Judge had no jurisdiction to decide this question in the testamentary case and, therefore, it would not operate as *res judicata*. In support of this argument they rely on the case of *Sinniah v. Muruge.u* [1].

In the last mentioned case the parties had raised the question as to the ownership of a piece of land in a testamentary proceeding and the District Judge did not decide that question but merely said, " The property in dispute is maternal property ". He did not say to whom he adjudged that property. This was held to be so vague that it did not conclude the rights of parties and, therefore, did not operate as *res judicata*. I would observe, with respect, that this was the *ratio decidendi* in the case, though Macdonell, C.J., went on to point out that that order could not have been made under any of the provisions of the Civil Procedure Code governing testamentary suits.

Mr. Jayewardene based his submission on the observations of Macdonell, C.J., quoted above.

Mr. Gunasekera submitted that the District Court had jurisdiction over testamentary matters and in the exercise of such jurisdiction it was competent to such Court to decide the question of heirship. He also referred us to the following passage in the case of *Weerasooria v. Controller of Establishments* [2] :—

" To quote the words of Sir Asutosh Mookerjee, A.C.J., in that case (*Hriday Nath Roy v. Ram Chandra Barna Sarma*, A. I. R. 1921, Calcutta 34)—

' The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction ; and where there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction . . . .

' Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. . . . . There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this : the former is

[1] *(1935) 3 C. L. W. 134.* [2] *(1949) 51 N. L. R. 189 at 191.*

reversible by an Appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction.' "

In the case of *Malkarujun v. Narhare* [1] Lord Hobhouse said, " A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken, the decision, however wrong, cannot be disturbed." I would respectfully qualify this observation by adding : provided the Court had the power to hear and determine the dispute.

In the case of *Marjan v. Burah* [2], it was held that when a Court has jurisdiction of the subject-matter and the parties its judgment cannot be impeached collaterally for errors of procedure. This case was referred to with approval by Weerasooriya, J. in *Theivanaipillai v. Nalliah* [3].

Parties can by consent waive objection to procedure. In the case of *Meenatchy Atchy v. Palaniappa Chettiar* [4], Keuneman, J., said : " . . . . provided there is no inherent want of jurisdiction in the Court with regard to the subject-matter before it or with regard to the person, parties by agreement may arrange their own procedure and give jurisdiction to the Court to adopt that procedure, and the parties should be held to the agreement that questions between them should be heard and determined by proceeding quite contrary to the *cursus curiae* . . . . "

Therefore, even if the order P6 " could not have been made under any of the provisions of the Civil Procedure Code governing testamentary suits " it was competent to the District Court to determine the question of heirship which was presented to it by the parties. There was no inherent want of jurisdiction in it with regard to the person or the subject-matter. Therefore, the order P6 was binding on Elmali and Bali, subject to appeal, and would operate as *res judicata* as between those who claim through them.

In the result, I would dismiss the appeal with costs.

Appeal dismissed.

[1] *(1900) I. L. R. 25 Bombay 337 at 348.*
[2] *(1948) 51 N. L. R. 34.*
[3] *(1961) 65 N. L. R. 346.*
[4] *(1941) 42 N. L. R. 333 at 334.*