1940

Present : **Howard C.J.**

JAYASUNDERA *v.* ANDRIS *et al.*

190—C. R. Galle, 18,956.

Res-judicata—*Partition action—Claim by defendant to defined lot—Dismissal of action—Subsequent suit by defendant.*

Where a partition action was dismissed on the ground that the defendant had acquired title to a defined lot as against another defendant to the action and where the defendant subsequently brought an action to vindicate title to that lot against that other defendant.

***Held*, that the decision in the partition action operated as *res judicata*. *Saram Appuhami v. Martinahamy* (*12 N. L. R. 102*) followed.**

APPEAL from a judgment of the Commissioner of Requests, Galle.

N. E. Weerasooria, K.C. (with him *H. A. Chandrasena*) for the plaintiff, appellant.

E. B. Wikremanayake (with him *S. Mahadeva*), for the defendant, respondent.

Cur. adv. vult.

June 20, 1940. HOWARD C.J.—

This is an appeal by the plaintiff from a decision of the Court of Requests, Galle, dated June 26, 1939, holding that the plaintiff is entitled to one quarter of lot purchased on document P 6 and to the rubber plantation whilst his claim in excess was dismissed with costs. The

appellant contends that the learned Commissioner was wrong in rejecting his plea that the matter was *res judicata* by reason of the decision in a connected case D. C. 35,553. Case D. C. No. 35,553 was an action for partition of an extent of land of which the land to which the plaintiff claimed title in this action, that is to say lot 9 in plan marked P 1, formed part. The plaintiff's action in D. C. No. 35,553 was dismissed with costs, the Court holding that the parties who claimed specific blocks had been in possession of those specific blocks for a period exceeding 10 years before the institution of the case. In that case the first defendant in this case joined with the plaintiff in asking for the partition of the land and was the seventeenth defendant. The plaintiff in this case who was the eighteenth defendant in D. C. No. 35,553, claims title to lot 9 as having been possessed exclusively by him against all parties who alleged and claimed common possession. The plaintiff by deed established his title to a nineteen-twentieth share of the said land by right of purchase. He claims he has made plantations of rubber and coconut thereon and has been in possession of the entirety thereof for a period of over 27 years. With regard to the plea of *res judicata* the following passage from the judgment of the District Judge in D. C. No. 35,553 is in point :—

> "The 18th defendant" (*i.e.*, the plaintiff in this case) "has been acquiring rights in lot 9 on different deeds from various parties and has been in possession of this lot for several years. He has no right in the rest of the land. There is some dispute between him and 17th defendant which need not be considered. One fact is clear, viz., that lot 9 has been possessed as a separate entity all along by the 18th defendant and his predecessors for a period exceeding 10 years and these people did not claim any share from the remaining portion of the land."

And at the end of the judgment the learned Judge states :—

> "It is unnecessary to decide the dispute about the house and certain plantation. This should be incorporated in the decree."

In the Surveyor's report in D. C. No. 35,553 it is stated that the seventeenth defendant, *i.e.*, the first defendant in this case, claimed one-fourth share of the entire land surveyed. With regard to the plantations on lot 9 it was stated as follows :—

"5 coconut trees, 30 to 35 years ; 18 rubber trees, 10 to 12 years ; 11 jak trees, 30 to 35 years	P/S to 17th defendant and disputed and claimed by A. C. Jayasundera.

The learned Commissioner has held that, as the learned Judge in his judgment in D. C. No. 35,553 stated that the dispute between the plaintiff and the seventeenth defendant need not be considered, he is unable to hold that the finding in D. C. No. 35,553 was *res judicata*. It is necessary, however, to scrutinize the judgment somewhat more closely to see exactly what the learned Judge intended when he used the words "some dispute". In this connection the following issues were framed in D. C. No. 35,553 :—

> "Who is entitled to the disputed plantation on lot 9—the 17th defendant or the 18th defendant ?"
>
> "Is the 18th defendant exclusively entitled to the entirety of lot 9 ?"

In these circumstances I do not see how it can be said that the question of the title to lot 9 was not raised and decided in this case. "Some dispute" which need not be considered must be taken to refer to the "dispute" about the "certain plantation" which, in the closing words of the judgment of the District Judge, he held it was unnecessary to decide. In this action, however, the defendant in his answer to the plaintiff's claim has not maintained his claim to the rubber plantation.

I, therefore, hold that the plaintiff's claim to the entirety of lot 9 was decided in D. C. No. 35,553. That, however, is not the end of the matter as it does not from such a finding of necessity follow that the matter is *res judicata* so far as this action is concerned. In *Senaratne v. Perera*[1], cited with approval by Moseley A.C.J, in *Fernando v. Fernando*[2], Jayewardene A.J. expressed himself as follows:—

"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, not only between 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 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."

The principles governing the application of the rule of *res judicata* was also set out by Sir George Lowndes in *Mt. Munni Bibi and another v. Tirloki Nath and others.*[3] The three conditions which the Board adopted as the correct criterion 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.

There seems to be some inconsistency between the criterion as formulated by Sir George Lowndes and the principle expounded by Jayawardene A.J. in *Senaratne v. Perera* inasmuch as according to Sir George Lowndes it is a condition precedent to the application of the rule of *res judicata* that it must be necessary to decide the conflict between the defendants to give the plaintiff the relief he claims. The rule as stated by Jayawardene A.J. does not, however, in his exception (2) include such a

[1] *26 N. L. R. 225.*
[2] *41 N. L. R. 208.*
[3] *A. I. R. 1931, P. C. 114.*

condition precedent. For the following reason, however, I do not think it is necessary for the decision of this case to decide whether the principle laid down by Jayewardene A.J. is correctly stated. D. C. No. 35,553 was an action for partition. It was held in *Saram Appuhamy v. Martinahami,*[1] that when a partition suit was dismissed on the ground that the defendant had acquired title by prescription and when the defendant subsequently brought an action to vindicate his title to the land pleading the judgment in the partition suit as *res judicata,* the judgment in the partition suit operated as *res judicata* and prevented the parties from raising the question of title again. In the course of his judgment in the case Wendt J. stated as follows :—

> "Now it is trite law that in a partition action the plaintiffs (and each party is practically plaintiff in respect of the interest he claims) must prove not only their common ownership *inter se,* but also a good title as against all others, because the effect of a decree of partition is to confer an absolute title."

In regard to the question of title to lot 9, the plaintiff in D. C No. 35,553 and the present first defendant really occupied the position of co-plaintiffs in relation to the present plaintiff. For these reasons I am of opinion that the appeal must be allowed and judgment entered for the plaintiff as prayed for except that damages are awarded at Rs. 20 a year till the plaintiff is restored to possession. Although plaintiff claimed Rs. 150 per annum in his plaint, his evidence is that he could have obtained an income of Rs. 20 per annum only. The plaintiff is allowed his costs in this Court and the Court below.

Appeal allowed.

[1] *12 N. L. R. 102.*