GEORGINA PARIS

v.

CATHERINE THERESA FLORENCE

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A), GOONEWARDENA, J. AND PRIYANTHA PERERA, J.
C.A. 306/75 (F).
D.C. NEGOMBO 1261/L.
SEPTEMBER 29, 1986.

Res judicata – S. 207 Civil Procedure Code – Doctrine of merger in Judgment – Former recovery.

Whatever is laid down, as held, or ordered, within the four corners of a decree cannot be debated again in a subsequent action between the same parties or their privies.

The right or cause of action set up in the suit is extinguished merging in the judgment which is pronounced. The result is that no further claim may be made upon the same cause of action in any subsequent proceeding between the same parties or their privies. The doctrine of merger in judgment gives rise to what is termed a plea of former recovery. Recovery however means no more than recovery of the right, as judicially declared, to the relief granted: it does not mean physical or actual recovery of the money or other relief awarded by the judgment. Everything which happens afterwards in relation to its enforcement or fruition is irrelevant.

Where in a previous suit the plaintiff had obtained a decree of declaration of title to a land, ejectment and damages against a defendant, he cannot afterwards sue him again for the same relief in respect of the same land giving a different date of dispute. Section 207 of the C.P.C. bars such an action and operates as res judicata. The plea of former recovery is entitled to succeed in such a case though execution in the former case failed.

Cases referred to:

(1) *Samichi v. Pieris – (1913) 16 NLR 257, 266.*
(2) *Morais v. Victoria – (1968) 73 NLR 409, 412.*
(3) *Wimalasekera v. Dingirimahatmaya – (1937) 39 NLR 25.*
(4) *Welasipillai v. Kanapathipillai – (1941) 42 NLR 522.*
(5) *Blair v. Curran – (1939) 62 CLR 4.*
(6) *Kendall v. Hamilton – (1879) 4 App. Cas. 504 HL, 526.*
(7) *King v. Hoare – (1844) 13 M & W 494, 504.*
(8) *Kirikitta Saranankara Thero v. Medagama Dhammananda Thero – (1954) 55 NLR 313, 315.*

APPEAL from judgment of the District Judge of Negombo (on reference under Article 146(3) of the Constitution).

Dr. H. W. Jayewardene, Q.C. with *Lakshman Perera* and *Miss T. Keenavinna* for substituted-defendant-appellant.

J. W. Subasinghe, P.C. with *Bimal Rajapakse, Miss S. Seneviratne* and *Miss Kalyani Priyawatta* for substituted-plaintiff-respondent.

Cur. adv. vult.

November 14, 1986.

G. P. S. DE SILVA, J. (President, C/A)

This is an appeal referred to a Bench of three Judges in terms of Article 146(3) of the Constitution. The question for decision relates to a plea of res judicata taken by the substituted defendant-appellant.

The plaintiff filed this action in November 1967 for a declaration of title, ejectment and damages in respect of the land described in the schedule to the plaint. The title pleaded was the final partition decree, dated 19th November, 1946, entered of record in case No. 11886 of the District Court of Negombo. The plaintiff further averred:–

(i) that on 12th April, 1958 he had filed case No. 19673, D. C. Negombo, against the same defendant for declaration of title, damages and ejectment from the land which is the subject matter of the present action;

(ii) that case No. 19673 proceeded to ex parte trial on 18.9.59 in the absence of the defendant, and judgment was entered in plaintiff's favour. (The decree nisi, dated 18.9.59 was produced marked P3 and the plaint was marked P4)

(iii) that on 9th February, 1960, the said decree nisi was made absolute (P3a);

(iv) that his efforts to execute the decree were unsuccessful and ultimately, the court by its order, dated 6th November, 1967, refused his application for the re-issue of the writ on the ground that he failed to exercise due diligence on the last preceding application.

In paragraph 8 of the plaint, the plaintiff further averred that–

"the decree entered of record in the said case No. 19673 D.C. Negombo is res judicata as between the plaintiff and defendant....."

Dr. Jayewardene, counsel for the substituted defendant-appellant, stressed the fact that there was a further averment in the plaint that the defendant is in unlawful occupation of the land from 9th February, 1960, to the plaintiff's loss and damage assessed at Rs.25 per month (para 8). The plaintiff prayed for not only a declaration of title and ejectment but also for damages in a sum of Rs.25 per month from 9th February 1960 until the defendant is ejected and the plaintiff is placed in possession.

The defendant in his answer, while seeking a dismissal of the plaintiff's action and a declaration that he is entitled to the land by prescription, pleaded *inter alia:*

"That as a matter of law.....the plaintiff should have executed the decree entered by this court in case No. 19673 and ejected the defendant and recovered damages. The plaintiff cannot and is now estopped by law from filing a separate action against this defendant to obtain the same reliefs." (Paragraph 9 of the answer)

At the trial the following issues were raised on behalf of the substituted plaintiff:–

(1) Is the substituted plaintiff entitled to the land described in the schedule to the plaint, on the title pleaded in the plaint and/or prescriptive possession?

(2) Is the decree in case No. 19673 of this court, res judicata between substituted plaintiff and the substituted defendant?

(3) Since 9.2.60, did the deceased defendant dispute the title of the deceased plaintiff to the said land?

(4) What amount of damages is the substituted plaintiff entitled to?

The District Judge answered issues 1, 2 and 3 in favour of the plaintiff, and on issue 4, granted the plaintiff damages in a sum of Rs. 25 per month. The substituted defendant has now appealed against the judgment.

At the hearing before us, Dr. Jayewardene, counsel for the substituted defendant-appellant, relying on issue No. (2), contended that the previous action filed by the plaintiff is a bar to the present action. Counsel's submission was that once the plaintiff obtained a decree in his favour in the earlier action, he should have proceeded to execute that decree and that it was not open to him to file the present action in view of the provisions of section 207 of the Civil Procedure Code. In short, Dr. Jayewardene argued that upon the entering of the decree in case No. 19673, the cause of action was "exhausted" and all the reliefs claimed were also "exhausted". Dr. Jayewardene emphasised that in the earlier action, which admittedly was against the same defendant and which was in respect of the same land as in the present action, the defendant was ordered to pay damages *"until the plaintiff is restored to possession"* (vide P3, the decree nisi in case No. 19673).

On the other hand, Mr. Subasinghe, argued that the plea of res judicata must fail for the reason that the plaintiff relied on a continuing cause of action; that each day the defendant remained in unlawful occupation of the land, a fresh cause of action arose; that while the plaintiff pleaded in the earlier action that the date of unlawful entry was 18th February 1957, in the present action he relied on a different date, namely 9th February, 1960. The validity of this submission has to be considered having regard to the provisions of section 207 of the Civil Procedure Code and the terms of the decree entered in favour of the plaintiff in the previous action (P3).

Section 207 reads thus:

> "All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non suited".

Pereira, J. in *Samichi v. Pieris* (1), referring to section 207 observed:

> "What section 207 of the Civil Procedure Code enacts is that, primarily, all decrees shall be final between the parties. This is the substantive enactment in the section, meaning that *whatever is laid down, as held, or ordered, within the four corners of a decree*

cannot be debated again in a subsequent action between the same parties. Then comes the explanation, which says that every right of property or to relief of any kind which can be claimed or put in issue between the parties to an action upon the cause of action for which the action is brought cannot afterwards be made the subject of action between the same parties for the same cause. These concluding words are important, and they must be given a meaning, and their only meaning appears to be that, as regards the incidental and collateral matters mentioned in the explanation, the decree would be res judicata only where, another action is attempted on the same cause of action". (The emphasis is mine).

What then are the matters which were "laid down, as held, or ordered" in the decree in the earlier action? It was ordered and decreed–

(*a*) that the plaintiff be declared entitled to the land in suit;

(*b*) that the defendant be ejected from the premises and the plaintiff be placed in quiet possession thereof;

(*c*) "It is further ordered and decreed that the defendant do pay the plaintiff the sum of Rs. 260 being damages up to 18th March 1958 and further damages at Rs. 20 per month until the plaintiff is restored to possession".

It is thus manifest that the plaintiff in his previous action obtained a decree for continuing damages until the plaintiff is restored to possession of the land which is the subject matter of the present action. The damages decreed are clearly on the basis of a continuing wrong which results in damages. There can be no other basis for the award of such damages. It seems to me that Dr. Jayewardene is right in his submission that the fact that the cause of action is a continuing one is necessarily involved in, and covered by, the terms of the decree entered in the previous action. Therefore Counsel's submission that the substantive enactment in section 207 of the Civil Procedure Code is a bar to the present action is entitled to succeed. A party cannot re-agitate a matter which by necessary implication is concluded by the decree in the previous action--- *Interest reipublicae ut sit finis litium.*

It appears to me that the "cause of action" in the two suits are in truth the same. Sirimane, J. in *Morais v. Victoria* (2) stated–

> "The 'cause of action' in a suit for declaration of title to land flows from the right of ownership.....It consists of the denial of the title of the owner to that land, and his being prevented from possessing that land. The two acts together constitute the wrong for which redress may be sought".

The denial of the title of the plaintiff and the fact of his being kept out of possession continued throughout from the time of the institution of the earlier action. By purporting to plead a different date of unlawful entry into the land from that pleaded in the earlier action, the plaintiff cannot, in the circumstances of this case, claim that he had come into court in the present action on a "cause of action" different from that pleaded in the earlier action. In substance, the "cause of action" is the same in both suits.

Mr. Subasinghe relied on the judgment of Maartensz, J. in *Wimalasekera v. Dingirimahatmaya* (3). The precise question that arises in the instant appeal did not arise for consideration in that case. That was an action for declaration of title, for a decree of possession and for ejectment. The plaintiff had brought a previous action against the same defendants and obtained a declaration of title but had not prayed for a decree of possession. The argument that the plaintiff was precluded from seeking a decree in ejectment as he had not prayed for it in the first action was rejected by Maartensz, J. However, in the appeal before us the plaintiff had in his earlier action prayed for *and obtained* a declaration of title, a decree in ejectment, and continuing damages until he is restored to possession. As submitted by Dr. Jayewardene, *Wimalasekera's case (supra)* (3) could therefore be distinguished from the case before us.

I accordingly hold that the decree in the previous action operates as res judicata and that the plaintiff cannot have and maintain this action. I therefore allow the appeal, set aside the judgment of the District Court and dismiss the plaintiff's action. The substituted defendant is entitled to costs of appeal fixed at Rs. 315.

GOONEWARDENA, J.

The facts pertaining to this appeal are set out in the judgment of G. P. S. de Silva, J. the President of this Court which I have had the advantage of reading in draft. I think it is appropriate to express my views upon some aspects of the argument placed before us.

Mr. Subasinghe for the substituted plaintiff-respondent contended that after the entering of a decree absolute on 9.2.1960 against the defendant in case No. 19673(P3A) there was a cause of action (which he described as a continuing cause of action) which accrued to the plaintiff to sue the defendant afresh, on the basis that on every day after that date that the defendant continued to be in possession of the premises, such possession gave rise to a new cause of action.

Dr. Jayewardene for the substituted defendant-appellant referred us to the doctrine of merger in judgment, with respect to the said decision in the earlier case No. 19673, and pointed out to the relief sought and obtained by the plaintiff against the defendant in that earlier case. Such relief was a declaration of title to the premises in favour of the plaintiff; an order to eject the defendant therefrom and to deliver possession thereof to the plaintiff; damages up to the time of institution of action; and continuing damages up to the time of recovery of possession payable by the defendant. The relief claimed in the instant action it is observed is identical, being a declaration of title to the premises, a decree for restoration of possession thereof, and damages till recovery of possession.

Since the principal argument of Dr. Jayewardene revolved around the effect of this doctrine to the position arising upon the present case, and having regard to the issue relating to res judicata raised at the trial, some special attention in my view should be paid to the questions then involved. Before doing so I venture to express my view that the law relating to res judicata in this country, if it does not already embody this doctrine of the English law, is wide enough to accommodate it.

In *Samichi v. Peiris (supra)* (1) two of the judges that constituted the Full Bench that decided the case (Lascelles, C.J. and Wood Renton, J.) were of the view that our law of res judicata is not limited to that found in the appropriate provisions of the Civil Procedure Code, while the other judge, Perera, J. was prepared to concede that such law in

certain circumstances could be supplemented by the English law. This view, that the provisions of the Code are not exhaustive of the law of res judicata, was echoed in the later case of *Welasipillai v. Kanapathipillai* (4).

.The doctrine of merger in judgment gives rise to what is termed a plea of 'former recovery' and is exhaustively dealt with in "The Doctrine of Res Judicata" by Spencer Bower and Turner, the second edition of which is the work referred to here. In the introduction at page 1, the doctrine is explained thus:

> "..... by virtue of the decision the right or cause of action set up in the suit is extinguished, merging in the judgment which is pronounced. *Transit in rem judicatam.* The result is that no further claim may be made upon the same cause of action in any subsequent proceedings between the same parties or their privies".

As Dixon, J. said in *Blair v. Curran* (5) (H. Ct of Aus) at page 532:

> "The very right or cause of action claimed or put in suit has in the first proceedings passed into judgment, so that it merged and has no longer an independent existence".

Lord Penzance explained the effect of the doctrine in *Kendall v. Hamilton* (6) thus:

> "When that which was originally only a right of action has been merged into a judgment.....the judgment is a bar to an action brought on the original cause of action".

The principal theoretical basis and justification of this rule, which it does not share with the doctrine of estoppel *per rem judicatam* (estoppel by res judicata), can be gleaned from the words of Baron Parke in *King v. Hoare* (7) (at page 504):

> "The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher".

The two doctrines on the other hand are said to share as their basis of justification the theories expressed in the two maxims, *interest reipublicae ut sit finis litium* (the general interest of the community in the termination of disputes and in the finality and conclusiveness of judicial decisions) and *nemo debet bis vexari pro uno et eadem causa* (the right of the individual to be protected from vexatious multiplication of suits).

The aspect of this doctrine of relevance to the present appeal is expressed in Spencer Bower and Turner (ibid) articulating the effect of the authorities thus (at page 364)–

> "A former recovery.....is established by proof that the party against whom the plea or bar is set up has in previous litigation.....obtained a judgment for the same relief as that which ..... he is claiming in the present litigation".

and at page 365:

> "'Recovery', however, means no more than recovery of the right, as judicially declared, to the relief granted: it does not mean physical or actual recovery of the money or other relief awarded by the judgment. The original cause of action is merged in the judgment as soon as it has been pronounced; it follows that everything which happens afterwards, in relation to its enforcement or fruition is irrelevant. Accordingly, it has been held that a plea of former recovery, otherwise good, is nonetheless so merely because the former judgment was infructuous, the judgment creditor being either unwilling, or unable, to obtain satisfaction by payment, execution..."

I find it difficult then to reconcile the resultant effect of what Mr. Subasinghe contended for with the position arising in law, as appears from what I have just stated. The original judgment in the said case No. 19673 constituted the 'former recovery' which was a right as judicially declared, to the relief granted there to the plaintiff. I have already referred to the relief he so obtained and it is useful to emphasize that his failure to secure enforcement of such relief was irrelevant. Upon proof of his having 'obtained a judgment' for the same relief as that which he is claiming in the present litigation the plea of 'former recovery' operated against the plaintiff and he was then precluded from seeking to duplicate the relief so obtained in the earlier action, in the present one.

Mr. Subasinghe relied strongly on the judgment of *Wimalasekera v. Dingirimahatmaya (supra)* (3). There it was shown that in an earlier action the plaintiff had obtained the relief of a declaration of title simpliciter, without a decree for delivery of possession. It was held that he could maintain the later action seeking a declaration of title along with a decree for delivery of possession. One can readily understand that this decision does not come into conflict with what I have stated earlier, when viewed from the standpoint of the relief

granted, the 'former recovery' not being co-extensive with the relief claimed in the latter action, as it was unaccompanied by a decree for delivery of possession.

With respect to his submission based upon a continuing cause of action Mr. Subasinghe relied upon a passage in the case of *Kirikitta Saranankara Thero v. Medagama Dhammananda Thero* (8) which reads :

> ".....but there is much to be said for the argument that a continuing invasion of a subsisting right constitutes in truth a continuing cause of action."

It is doubtful whether that statement, which in reality was no more than an expression of opinion with respect to a particular situation in that case, can be said to have any application to the case we are concerned with. It was made there, with reference to a plea set up against the plaintiff who sought a declaration of status as incumbent of a Buddhist temple, that his cause of action was prescribed. Gratiaen, J. said (at the same page) :

> An action to be declared entitled to the incumbency of a Buddhist temple is an action for a declaration of status.....The 'cause of action' is the 'denial' of the plaintiff's status because it constitutes either an actual or seriously threatened invasion of his vested rights."

A continued 'denial' of a status, one may perhaps say, is a 'continuing cause of action' but, whether the description is altogether apt with respect to the position of one kept out of possession of property, such as in the instant case, is in my view doubtful. As I see it, the only sense, if at all, in which one may possibly understand that expression with respect to the case of a person wrongfully kept out of possession of property, is to say that it is, a continuation of one and the same original cause of action, rather than a new cause of action arising every day on which such person is kept out of possession, as was the contention of counsel.

I concur with the view expressed by G. P. S. de Silva, J. that in substance the cause of action is the same in both suits and hold that the decree in the earlier suit operates as res judicata between the parties in the latter.

The appeal is allowed.

PRIYANTHA PERERA, J. – I agree.

Appeal allowed.