SHELTON DE SILVA
V.
CHARLES DE SILVA

COURT OF APPEAL
S. B. GOONEWARDENE J. AND
VIKNARAJAH J.
C. A. 637/79(F) D. C. PANADURA 12983/L
MARCH 28, 1988

Res judicata — Paper title and prescription — Same plaintiff suing on two differing titles.

The plaintiff sued his brother the defendant for declaration of title and recovery of possession of certain premises in Case No. 11525. The plaintiff had however before the institution of the action sold the premises to one Jefferjee on Deed No. 194 of 19.8.1954 subject to the condition that he had a right to obtain a reconveyance of the said premises within six months. The plaintiff failed to obtain the reconveyance within the time limit. Yet when the action No. 11525

was pending by two deeds No. 69 of 21.7.71 and No. 1513 of 3.5.1972 the plaintiff obtained the reconveyance. On 5.9.1972 the plaintiff's action was dismissed on the ground that he had no title at the time the action was instituted and he had failed to prove prescriptive possession independent of the paper title he had parted with. The plaintiff then filed the present suit No. 12983/L for the same premises on his title on Deeds 69 and 1513 and the defendant pleaded res judicata.

Held:

(1) The Media on which the plaintiff now seeks a declaration of title are different from the media on which he based his title in the earlier case. The cause of action is different.

(2) Prescriptive title has to be re-considered on the basis of the new character in which the plaintiff figures in the second action. Plaintiff would have passing to him whatever title by prescription which Jefferjee had and this differs from the prescriptive title he claimed in the earlier case.

Cases referred to

1 *Dingiri Menika v. Punchi Mahatmaya* 13 NLR 59

2 *Lowe v. Fernando* 16 NLR 398

3. *Charles v. Mohammed 25 NLR 233*

APPEAL from Judgment of the District Court of Panadura.

H. L. de Silva P.C. with *Cecil de S. Wijeratne* and *L. N. A. de Silva* for plaintiff-appellant.

E. D. Wickremanayake for defendant-respondent.

Cur. adv. vult.

May 24, 1988
S. B. GOONEWARDENE, J.

This is an appeal from a judgment dismissing the plaintiff-appellant's action in the District Court, consequent upon an answer adverse to him to a preliminary issue raised at the trial.

The action was one intended to obtain a declaration of title to and possession of a property described as a portion of Etambagahawatte. The plaintiff who sued his brother the defendant to obtain this relief had filed an action earlier against

him bearing No. 11525 seeking like relief, and by a judgment dated 5th September 1972 the District Judge had dismissed that action.

At the trial of the present action which was instituted on the 23rd of May 1972 (that is before the judgment in the earlier case was delivered) an issue numbered as 2 was raised and it reads thus:—

"(2) Is the decree in case No. 11525 of this Court res judicata between the parties?".

This was taken up as a preliminary issue, answered in the affirmative and consequently the plaintiff's action was dismissed, resulting in this appeal.

At the hearing before us Counsel for the plaintiff drew attention to the judgment in the earlier case No. 11525 which had been produced. Upon a reading of that judgment it is to be observed that the basis for the dismissal of that action was that at the time of its institution the plaintiff had no title. By deed No. 194, of 19th August 1954 (which was before the institution of that action) the defendant had conveyed the property to one A. I. Jefferjee by way of a conditional transfer, the condition being that he had a right to obtain a reconveyance of the same within six months. That, the plaintiff failed to do, so that at the time of institution of that action the paper title was in Jefferjee. However it would appear that while that action was pending, upon two deed Nos. 69 of 21.7.1971 and 1513 of 3.5.1972, Jefferjee conveyed the property back to the plaintiff. At the trial of the earlier action there was an issue raised which reads thus:—

"(1)Is the plaintiff the owner of the land and premises described in the schedule to the plaint

(a) on the title pleaded in paragraph 2 to 8 of the plaint and

(b) also by prescriptive possession?"

In addition there was issue No. 14 which reads

(14) In as much as the plaintiff admits that he was dispossessed in 1966 in paragraph 10 of the plaint did the

plaintiff have a sufficient period of time to have prescribed to the said land?

The approach of the District Judge in action No. 11525 appears to have been to consider whether at the time of its institution the plaintiff had title and if not what the effect of that was. This is demonstrated by the fact that after the evidence, and before the delivery of his judgment, the District Judge himself framed two issues.

(1) Did the plaintiff have title to the land at the time of instituting this action?

(2) If not can the plaintiff file this action?

He answered both limbs of the issue as to paper title and prescriptive title of the plaintiff in the negative, as also issue No. 14. It is convenient to state here that in my view that must be understood to mean that as at the time of institution of the action on 4th May 1969, firstly, the plaintiff had no paper title because he had parted with that by his deed of 1954 to Jefferjee and, secondly, that he had not prior to the institution of the action acquired a title by prescriptive possession independent of the paper title he had parted with.

At the hearing before us it was argued by Counsel for the plaintiff-appellant that the District Judge was wrong in his answer to the issue of res judicata and that it should have been answered the other way. He therefore submitted that this Court should do that in appeal and send the case back for further hearing. He relied upon the judgment in two cases, namely, *Dingiri Menika v. Punchi Mahatmaya* (1) and *Lowe v. Fernando* (2) as supporting his contention that the expression 'cause of action' imports a dependence on the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour, and, if I understood him correctly, such media stood different in the earlier case from the present one inasmuch as in the latter the title relied upon by the plaintiff was that directly derived from Jefferjee, which was not the position in the earlier case.

I think the point is well taken and indeed Counsel for the defendant-respondent conceeded its correctness which therefore requires no further consideration. Counsel for the respondent however added that the issue of res judicata had a two fold effect which was, firstly with respect to paper title and, secondly with respect to prescriptive title. He submitted that although in law the plaintiff may be entitled to succeed in appeal on the paper title aspect, the defendant should have reserved to him the liberty at the further trial, upon the case going back to the District Court, to put in issue the plea of res judicata on the prescriptive title aspect of it. His argument was that the findings with respect to the prescriptive title aspect were against the plaintiff and thus favourable to the defendant and that the benefit of these findings must continue to be available to the defendant to be utilised in the form of a plea of res judicata to be put in issue. Such a reservation can be justified only on the basis that the District Judge decided the issue of res judicata on the aspects both of paper and prescriptive title or at least on the aspect only of paper title. If on the other hand the District Judge decided the issue on the aspect of prescriptive title only (as I will endeavour to show he did), to accede to the claim to make this reservation means that the case will be placed once again where it was at the commencement of the trial and the whole question remains open to be agitated all over again. Starting with the written submissions tendered to the District Judge by the defendant, I do not see anything there to show that he was contending that the decision in the earlier action on the paper title aspect of the case set up by the plaintiff operated as res judicata. The entire submission of the defendant had been on the prescriptive title aspect of the earlier finding, so that if the reservation asked for is allowed, the defendant will be at liberty once again, that is for the second time, to urge the identical question, a process in my view neither desirable nor permissible; and the basis of allowing this appeal would then be as if the defendant had succeeded in the District Court upon a contention that the paper title aspect operated as res judicata which in the event was not so.

The reasoning adopted by the District Judge has been that the two cases are in respect of the same property between the same

parties and in the same capacities and that the fact that the same plaintiff in both cases acquired new title during the pendency of the former case did not alter the complexion of the case. Having adverted to the issues I referred to in the earlier case as to the plaintiff's paper and prescriptive title and as to whether the plaintiff had had a sufficient period of time since his dispossession in 1966 to have acquired a prescriptive title and then to the answers to such issue in the negative, he (the District Judge) has gone on to state thus:— "Therefore it is understood that the matter of prescriptive possession relating to the same corpus has been finally decided and this matter cannot be agitated afresh under a new title obtained during the pendency of an action relating to the same matter. A comparison between the prayer in the concluded case No. 11525 and the plaint in the present case will show the action as one and the same".

I confess that I am unable to comprehend fully the thinking of the District Judge. If by reason of the reference to the two cases being with respect to the same subject matter between the same parties and in the same capacities one were to think that he was dealing with the paper title aspect of the issue of res judicata, for myself I do not find, apart from this bare statement, any process of reasoning that would justify the belief that he was. I rather think, on a fair reading of his judgment, that the District Judge held that only the findings in the earlier case as to the prescriptive title set up by the plaintiff, are those that constitute the earlier judgment res judicata between the parties. Stated in another way it is not wrong I think to say that the District Judge considered only the prescriptive title aspect of the issue.

It therefore becomes necessary to examine the prescriptive title aspect of the issue of res judicata and deal with it here because if it is found that such aspect as been correctly decided, then the findings of the District Judge upon the issue must be affirmed and the appeal must fail. If on the other hand it has not been correctly decided, then the issue must be answered here the other way unconditionally and without reservations and the case must go back for further hearing on the other issues. In short the whole issue raised must be considered and dealt with here.

The District Judge in the earlier case No. 11525 arrived at the following findings: that the defendant had been in occupation of the premises from 1956 till May 1962 but that that could not be counted for the purpose of prescription because he was living with his mother (also the plaintiff's mother) who had been permitted by the plaintiff to live in these premises; that from 16th May 1962 to 31st May 1962 the defendant was away in India during which period the plaintiff took advantage of his absence and took their mother elsewhere and having disconnected the electricity supply decided to take possession but that the defendant on his return from India forcibly took possession of the house; that the defendant's occupation prior to his departure was permissive under the mother while the period after his return from India was adverse; that the plaintiff did not have possession which would entitle him to set up a prescriptive title independent of any paper title which at the time of the institution of the action was in Jefferjee and that the plaintiff had not acquired prescriptive title.

I think that when making any attempt at understanding the content of the question involved here, one must keep in the forefront of one's mind the altogether different character in which the plaintiff figures in this action when compared with his character in the earlier action. If one imagines for a moment that the action had been brought by Jefferjee while the title remained in him, the plaintiff could notionally be thought to be in the shoes of Jefferjee. Again if the title of Jefferjee had passed, not to the plaintiff but to another whom I will refer to for convenience as 'X', the plaintiff would be in the shoes of 'X' been the one who instituted this action against the defendant. The failure to distinguish the two differing characters in which the plaintiff figured in the two actions was the fundamental error which the District Judge committed in his approach to the issue of res judicata. Had he done that he would no doubt have examined carefully the paper title aspect of that plea and also realised that with respect to the prescriptive title aspect of it the plaintiff would have been in the shoes of that character I referred to as 'X'. 'X' would have had passing to him by reason of the conveyance from Jefferjee, not only his paper title but also the benefit of whatever prescriptive possession Jefferjee may have

had (vide section 3 of the Prescription Ordinance and also the case of *Charlis v Mohahamed* (3) unencumbered in any way by the judgment in the earlier case and unaffected by any findings adverse to the plaintiff either with respect to paper title or with respect to prescriptive title. If that be so with respect to 'X' it must be so with respect to the plaintiff who is in no different a position from 'X' and neither the paper title aspect nor the prescriptive title aspect of the findings in the earlier case would operate as res judicata. The fact that the plaintiff in the earlier case happened to be the same person as the plaintiff in the present case is from the stand-point of this issue irrelevant and the matter I think should have been examined in that way. The District Judge was in error in answering this issue numbered 2 in the affirmative and the correct answer to that must be considered to be in the negative. The case will go back for trial on the other issues but the District Judge will not permit any further issues based upon the plea of res judicata although no doubt the defendant will be entitled to use any of the findings in the earlier case advantageous to him, in any other manner permitted by law. The issues numbered 1,3, and 4 which had been raised at the trial dealt with the question of the requirement of a Conciliation Board certificate. These issues were answered against the defendant but there has been no appeal therefrom. The answers given by the District Judge to these issues will therefore stand and will not be considered again at the further trial. Subject to these directions the District Judge will be at liberty to himself frame or adopt upon the suggestion of parties any other issues that he might consider necessary for a proper adjudication of the other matters in dispute in the case.

The defendant will pay the plaintiff-appellant his costs of appeal.

VIKNARAJAH, J — I agree

Appeal allowed.

Case sent back for trial
to be continued as directed.