

NANDAWATHIE AND OTHERS
v
TIKIRI BANDA MUDALALI

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA 286/96
D.C. POLONNARUWA 3722
MARCH 20, AND
JUNE 30, 2003

Civil Procedure Code, sections 147 and 207 – Action by original permit holder – Dismissal of action – Action by nominated successor – Res judicata – Roman Dutch Law principles – Original permit holder missing – Preliminary issues.

An action instituted by the original permit holder Poola seeking a declaration of title and ejection of the defendant-respondent was dismissed on the basis that the plaintiff was absent.

The present action was instituted by the nominated successor of Poola on the basis that the original permit holder had been listed missing.

The trial court answered the preliminary issues in favour of the defendant-respondent and concluded that the order of dismissal of the earlier action operated as *res judicata*.

On Appeal –

Held:

- (i) The District Judge has to exercise his discretion to try preliminary issues only if they are pure questions of law that go to the root of the case.
- (ii) There was no evidence before court to establish that Poola was the original permit holder and that the original plaintiff (in the present action) was nominated as successor upon the death of Poola, and that the original plaintiff succeeded due to operation of the Land Development Ordinance. There were no admissions recorded.
- (iii) The trial court could not have decided the preliminary issues, until the other issues were proved.
- (iv) The principle of *res judicata* to apply, the second action must be
 - (a) between the same parties;
 - (b) same subject matter; and
 - (c) same cause of action
- (v) It has not been proved that the original plaintiff (in the present action) is a privy or a heir of Poola.
- (vi) The decision in the earlier action was one of dismissal as the whereabouts of Poola the plaintiff was not known. No evidence had been led to establish his death. His heirs could not have continued the earlier action because they may have to wait for 7 years to apply the presumption that he was dead. Therefore the dismissal of the action is not a final judgment.
- (vii) The two causes of action are different.
- (viii) The order made in the earlier case amounts to an order made without competent jurisdiction.
- (ix) It is a rule of law that a solemn judgment on any matter standing *pro veritate accipitur*, but this effect cannot attach to a judgment given without a hearing.

APPEAL from the judgment of the District Court of Polonnaruwa.

Case referred to:

1. *Mutukrishna v Gomes et al* - (1994) 3 Sri LR 01
2. *Ayer v Changarapillai* - 2 NLR 17
3. *Pure Beverages Ltd., v. Shanil Fernando* (1997) - 3 Sri LR 202
4. *Mendis v Himappola* - (1843-1853) Ramanathan Report 88
5. *Herath v Attorney-General* - 60 NLR 193
6. *Dharmadasa v Piyadasa Perera* - 64 NLR 249

Ananda Kasturiarachchi with *U. Abeysiriwardena* for substituted plaintiff-appellant.

Manohara de Silva for defendant-respondent

Cur.adv.vult.

October 10, 2003

DISSANAYAKE, J.

The question that has been argued in this appeal is whether, the dismissal of the previous action bearing No. 2972 of the District Court of Polonnaruwa, which had been instituted by the permit holder of permit No. 234 dated 14.3.1946, operates as "*Res Judicata*" against the original plaintiff in this action whose present action is based on, being the nominated successor of the said permit.

It is interesting to note that the certified copies pertaining to the earlier action filed, bears out that it was an action instituted by the original permit holder Ranthilaka Pedige Poola, seeking declaration of title, ejection of the defendant-respondent from the land described in the schedule to the plaint, for ejection of the defendant-respondent and damages.

On 16.01.1988 on the plaintiff Ranthilaka Pedige Poola being absent and attorney-at-law Iddawela informing Court that the plaintiff Poolas whereabouts were not known, his action bearing No. 2972 has been dismissed.

The original plaintiff in the present action instituted this action on the basis that the original permit holder Poola had been listed missing as a result of flash floods that was caused following the destruction of the dam of the Kantale tank. As a result of disappearance of Poola, the prosecution of action bearing No. 2972 which had been instituted to eject the defendant-respondent who had unlawfully encroached onto the land in suit, had not been possible. 20

The original plaintiff in the present action who is said to be the nominated successor of the said permit bearing No. 234 had instituted the present action for declaration of title, ejectment of the defendant-respondent and damages.

It is to be observed that the land in suit, in the present action and the earlier action is the same. 30

At the commencement of the trial after recording of issues, the learned District Judge had decided to take up the legal issues pertaining to the question whether the principle of *res judicata* was applicable.

Both parties had been requested to tender their written submissions. The attorney-at-law for the defendant-respondent had tendered certified copies of the plaint, answer, replication and journal entries of the earlier action bearing No. 2972, marked V1, along with his written submissions. The learned District Judge by his order dated 05.06.1996 had answered the preliminary issues in favour of the defendant-respondent and had concluded that the order of dismissal of the earlier action bearing No. 2972 operated as *res judicata* against the present action and had proceeded to dismiss the action. 40

In the arguments of the appeal before this Court, learned counsel appearing for the plaintiff-appellant contended that the learned District Judge was in error when he dismissed the action of the substituted plaintiffs-appellants action on the following grounds namely:- 50

(a) that Court could not have tried issued Nos. 7 to 11 as preliminary issues, in view of the other issues recorded as well as the pleadings before the Court.

(b) that the doctrine of *res judicata* does not apply where the causes of action are different.

It is of significance to observe that section 147 of the Civil Procedure Code permits Court to try issues of law as preliminary issues, if the action can be disposed of on answering the said issues.

Disposal of such issues as preliminary issues depend on the nature of the issues. If they are purely based on questions of law which goes to the root of the case, then they must be tried first before the other issues. However, if they are mixed questions of fact and law, generally they shall not be tried as preliminary issues. The District Judge has to exercise his discretion to try preliminary issues only if they are pure questions of law, that go to the root of the case *Muthukrishna v Gomes* ⁽¹⁾ and *Ayer v Changarapillai*.⁽²⁾ 60

However if questions of fact have to be decided before deciding a certain issue of law, then the Court should not take up such an issue as a preliminary issue, even if it is an issue of law, which has the effect of finally disposing of the action. 70

If an issue of law arises in relation to a fact or factual position in regard to which parties are at variance, that issue cannot and ought not to be tried first as a preliminary issue of law *Pure Beverages Ltd v Shanil Fernando* ⁽³⁾.

In the case of *Pure Beverages Ltd v Shanil Fernando (supra)* U. de Z. Gunawardane, J. at page 209 observed:-

"As a final note, it also needs to be stressed that in a trial of an action the question as to how or in what manner the issues have to be dealt with or tried is primarily a matter best left to the discretion of the trial judge, and a Court exercising appellate or revisionary powers ought to be slow to interfere with that discretion except perhaps, in a case where it is patent or obvious that the discretion has been exercised by the trial judge not according to reason but according to caprice." 80

It is of significance to note that in the plaint of the present action, it was pleaded in paragraph 2, that on 14th March 1946, the additional Government Agent of Polonnaruwa issued permit bearing No. 234 to Ranthilaka Pedige Poola in respect of the land

described in the schedule to the plaint. In paragraph 3 of the plaint, it is pleaded that the original permit holder R.P. Poola during his life time, on 02.11.1979, nominated the original plaintiff as the successor. In paragraph 4 it is pleaded that the said Poola died during the destruction of th Kantale Dam and the original plaintiff had become the new permit holder. 90

By paragraph 3 the answer, the defendant-appellant had expressly denied that R.P. Poola was the permit holder and further it had been denied that the original plaintiff had been nominated, as the successor and that he had become the permit holder.

Thus the parties had been at variance on the above matters. 100
As a matter of fact at the commencement of the trial these matters have been put in issue, in issue numbers 1 to 5.

Therefore it is pertinent to observe that the Court could not have decided issues Nos. 7 to 11, as preliminary issues, without first determining issues Nos. 1 to 5.

Further it is to be observed that there were no admissions recorded in respect of the above matters. There was no evidence before Court to establish R.P. Poola was the original permit holder and that original plaintiff was nominated as successor and upon the death of R. P. Poola that the original plaintiff succeeded, due to 110
operation of the Land Development Ordinance.

Therefore it appears that the learned District Judge could not have decided issues Nos. 7 to 11 until issues Nos 1 to 5 have been proved. Thus it could be reasonably assumed that the learned District Judge has proceeded to answer issues Nos. 7 to 11, on the assumption that the matters out in issue by issues No. 1 to 5 have been proved.

The literal meaning of the term "*Res Judicata*" is that the matter has been decided and the effect of decisions and of interlocutory proceedings Vide page 297. "Voet commentary on the Pandects by Percival Gane" Vol VI. Under Roman law, *Res Judicata* means, 120
the termination of a controversy by a judgment of a Court in one way or the other.

Under Roman Dutch Law, *Res Judicata* has been described as a matter in which an end has been put to disputes in a declara-

tion of a Judge by absolution or discharge or adverse judgment. Vide page 297 "Voet, Commentary on the Pandects by Percival Gane" Vol VI. It is stated that by *res judicata* it is meant termination of controversy by the judgment of a Court. This is accomplished either by an adverse decision or by discharge from liability. 130

As enunciated by Voet, for the doctrine of *Res Judicata* to operate, there should be three requisites, namely,

- (a) same person
- (b) same thing and
- (c) same-cause,

The rationale of these doctrine is based on the maxim that it is in the interest of the state to have an end to litigation. The maxim that no man should be vexed twice for the same cause of action is based on this principle.

The principle of *res judicata* is embodied in the Civil Procedure Code in section 207 of the Civil Procedure Code. 140

Section 207:-

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.

Explanation:-

Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes on the passing of the final decree in the action, a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties (emphasis is added) 150

Therefore for the principle of *res judicata* to apply the second action must be:-

- (a) between the same parties
- (b) same subject matter
- (c) same cause of action.

E.R.S.R. Coomaraswamy in the law of evidence Volume I at page 528, 11 B.4 under the heading "Necessary Constituents of *Res Judicata*" states: In order to establish a plea of *res judicata*, the following constituents must be established. 160

- (i) The former action must have been a regular action;
- (ii) The two actions must be between the same parties or their representatives in interest (privies);
- (iii) The previous decision must be what in law is deemed such;
- (iv) The particular judicial decision must be what in law is deemed such; 170
- (v) The previous judgment must be a final judgment;
- (vi) The same question or identical causes of action must have been involved in both actions;
- (vii) The judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf;
- (viii) The judgment should not have been obtained by fraud or collusion;
- (ix) If it is a foreign judgment, it should have been passed in accordance with the principles of natural justice;

Let me now consider whether the above constituents are applicable to the facts of the present matter before me. 180

(i) Regular action

Certified copy of the plaint and the answer of case No. 2972 reveal that the former action was a regular action. It is seen that the case present action too is a regular action.

(ii) Same parties or their privies:-

In the earlier action bearing No. 2972 was by R.P. Poola who was the lawful permit holder.

In the present action the substituted plaintiff-respondent is the lawful permit holder by being nominated successor on the presumption that R.P. Poola has died. 190

The defendant-appellant has not led any evidence to establish the relationship of the original plaintiff in the present action and R.P. Poola and had thereby failed to establish that the original plaintiff in the present action is a privy or a heir of R.P. Poola on permit No. 234 the original plaintiff's name appears as the nominated successor.

(iii) The previous decision must be what in law deemed such

Action has been dismissed on the previous occasion.

(iv) The particular judicial decision must have been in fact pronounced as alleged. 200

Action bearing No. 2972 had been dismissed, by pronouncement of Court.

(v) The previous judgment must be a final judgment

The decision in case No. 2972 was one of dismissal of the action made on 06.01.1988 as the whereabouts of R.P. Poola, the plaintiff in that case was not known.

No evidence has been led as to when the destruction of Kantale tank bund took place and as to from what date R.P. Poola had gone missing. Since no evidence to establish his death was forthcoming his heirs could not have continued with case No. 2972 because, they may have had to wait for 7 years to apply the presumption that he was dead. This was in 1988 and before the applicability of the present amendment with regard to presumption of death of missing persons. 210

Therefore the dismissal of the action by the District Court is not a final Judgment.

(vi) The same question or identical causes of action must have been involved in both actions:

The former action was based on the defendant-appellant having entered into possession of the corpus with the leave and license of R.P. Poola, and his refusal to leave the premises after being requested to do so and had been instituted as a declaration of title and ejectment of the defendant-respondent. Whereas the present action had been instituted seeking a declaration of title and 220

ejection of the defendant-respondent who is alleged to be disturbing the original plaintiff's title.

Therefore it is manifest that it is not the same question or identical causes of action that are involved in both actions.

(vii) The judicial tribunal pronouncing the decision must have had jurisdiction in that behalf: 230

The order of dismissal of plaintiff's action has been made while Poola was represented by a counsel. Further 06/01/88 was not a trial date and Poola was not expected to be present in person. He has had a registered attorney-at-law on record. Yet his action was dismissed. The said order made by the District Court amounts to an order made without competent jurisdiction.

(viii) The Judgment should not have been obtained by fraud or collusion.

No fraud or collusion is alleged in obtaining the order in the former action. 240

(ix) If it is a foreign judgment, it should have been passed in accordance with the principles of natural justice:-

This is not relevant to the facts of the matters presently before us.

The former action bearing No. 2972 was dismissed as the whereabouts of the R.P. Poola had not been known. In the case of *Mendis v Himappola* ⁽⁴⁾ where the plaintiff was absent twice on the dates of trial and the case was dismissed twice, Stark, J. observed "Interest *reipublicae at sit finis lithium* is a good maxim; It follows out the very nature of society, for unless, there is an end to litigation rights would for ever remain uncertain and no man would ever enjoy that scrutiny of person and property without some degree of which society could not subsist, and it may be added, in proportion to the enjoyment of which in any society civilization advances or has opportunity to advance. 250

Accordingly it is a rule of law that a *solemn judgment* on any matter standing *pro veritate accipitur*. But this effect cannot attach to a Judgment given without a hearing of the case which appears to be the predicament in which the present suit is placed. If the 260

judgment in the previous case were in respect of the absence of the plaintiff and so of the nature of non-suits without evidence taken in the cause, they do not amount to *res judicata*, which is properly defined as legal judgment on the same point between the same parties, on the same ground or media concluded after argument or confession."

In *Herath v Attorney-General*⁽⁵⁾ it was concluded by Basnayake, CJ. that section 207 of the Civil Procedure Code will therefore apply only to decrees pronounced after there had been an adjudication on the merits of a suit and not to decrees entered 270 under section 84 of the Civil Procedure Code.

Since no *ex parte* trial was held in the former action bearing No. 2972, the decision in *Dharmadasa v Piyadasa Perera*⁽⁶⁾ does not apply to the action presently before me. In that case the defendant failed to appear on a trial date and the Court passed a *decree nisi* in terms of the section 85 of the old Civil Procedure Code which was made absolute in terms of section 86. The defendant instituted action subsequently and *res judicata* was tried as a preliminary issue. Gunasekera, J. at page 251 distinguishing *Herath v Attorney-General (supra)* said." there is an *ex parte* trial held and there had been adjudication of merit in the *ex parte* trial. Therefore, he proceeded to hold that the decree absolute for default that has been passed against the defendant is one which section 207 of the Civil Procedure Code applies and can, therefore operate as *res judicata* in a subsequent action between the same parties in respect of the subject matter." 280

In the facts before me, there was no *ex parte* trial held. The merits of the case was not considered by the learned District Judge. Court did not give it's mind to the rights of the parties at all. In the previous action on R.P. Poola being absent the action was dismissed. The Court did not make a determination in respect of rights of Poola. 290

In the line of the foregoing reasons, I am of the view that the learned District Judge had erred on the following matters;

(a) The decision to take issues Nos. 7 to 11 as preliminary issues, and

(b) his answers to the said preliminary issues in the affirmative.

Therefore I set aside the order of the learned District Judge deciding to take issues No. 7 to 11 as preliminary issues, and I set 300
aside the answers given to issues Nos. 7 to 11. I further set aside the order of dismissal of the action made by the learned District Judge. I order the learned District Judge to have trial, "*de novo*." Parties are free to raise fresh issues or adopt the issues already framed.

The appeal of the plaintiff-appellant is allowed with costs fixed at Rs. 5000/-.

SOMAWANSA, J. - I agree.

Appeal allowed; trial de novo ordered.