PONNAIAH *v.* PAYHAMY *et al.*

1905.
October 18.

D. C., Kandy, 15,765.

***Permission to bring fresh action—Institution of action before permission—Omission to plead one of several titles*—Res judicata—*Civil Procedure Code, s.* 33.**

A permission granted by the Appeal Court to a party to a suit to bring a fresh action does not render valid an action brought before such permission was granted.

Where a plaintiff brings an action for land, he must, under section 33 of the Civil Code, set out every title by which he claims to be entitled to it at the time of action. Where he omits to plead any title on which he might have relied in one action, he is debarred from setting up such title in a subsequent action.

APPEAL from a judgment of the District Judge of Kandy.

The plaintiff sued the defendants to vindicate a land called Tanenwatta. The defendants claimed the land, and also pleaded the decree in action No. 14,893 between the same parties as *res judicata* and a bar to the present action. In that action plaintiff claimed the land by right of inheritance, and when it was dismissed the plaintiff appealed, but before the appeal was decided brought the present action claiming the land on a transfer. In the appeal in the former action the dismissal was affirmed, but permission was granted to plaintiff to bring a fresh action, if so advised. It was contended for the defendants that, because the second action was brought before leave to bring a fresh action was given by the Appeal Court, the second action was bad. The District Judge held that the former action was not a bar, as the Appeal Court had given permission to bring a fresh action, though the permission was given after the institution of this case. Judgment having been entered for the plaintiff, the defendants appealed.

H. A. Jayewardene, for defendants-appellants.

Bawa, for the plaintiff-respondent.

17th October, 1905. LAYARD, C.J.—

The plaintiff in this case sought to be declared entitled to a certain land mentioned in the plaint. His title is founded on a purchase by one Sedu Tewar from a person named David Perera. Sedu Tewar after his purchase conveyed the land to plaintiff and one Minachchi.

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On Minachchi's death the plaintiff inherited her share, and he alleges that the defendants are in unlawful possession of this land. It is unnecessary here for me to set out the defendant's claim to the land. The defendant however pleads that the plaintiff could not maintain this action because he had previously brought an action in the District Court of Kandy against them in respect of this very land, the subject of this suit. In that action the plaintiff claimed to have inherited the land from Sedu Tewar. He admits that at the time of bringing the action he was aware of the conveyance to himself and Minachchi, but that he could not find the deed, and so in the original action he only claimed by inheritance. The defendants contend that the decision in 14,893 dismissing plaintiff's action is *res judicata*.

At the date of the institution of the present action the decree dismissing the plaintiff's action in the former case was in force. There was an appeal, however, taken from that decision and this court in affirming the judgment in that action gave the plaintiff permission to bring a fresh action if so advised. The appellant contends that the judgment in 14,893 is *res judicata*, and that this court had no power to give plaintiff permission to bring a fresh action because the plaintiff had not withdrawn the previous action. It is unnecessary for the purpose of my decision to decide here whether the permission granted by this court in its judgment in the former case was one that this court had no power to grant. I would only state that if the plaintiff does bring a fresh action in accordance with the permission there granted he must do so at his own risk, leaving it open to the court in which the new action is brought to decide as to whether the order of this court is one which entitles the plaintiff to bring a fresh action. If the decision in the former case is *res judicata*, the question still remains to be decided as to whether this action having been brought before the permission was given by this court to the plaintiff to bring a fresh action, he is barred by the former decision. I think that this action having been instituted prior to the judgment of this court in appeal, whatever may be the effect of permission given in that judgment, it cannot accrue to the benefit of the plaintiff who brought this action prior to such permission having been given him. Now, the subject in dispute in both these actions was the right of the defendants to retain possession of the land in dispute as against the superior title of the plaintiff. Section 33 of our Civil Procedure Code provides that " every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them." The original action ought

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then to have been so framed as to set out every title that the plaintiff might have claimed to the land in dispute. It cannot be said in this case that the plaintiff was unaware of his title by conveyance, because it is admitted that he was aware of it at the time the original action was brought. Now, reading section 33 with the explanation of section 207 it would appear that our Civil Procedure Code contemplated that every right to property should be set up and put in issue between the parties to an action in every case in which such right was based on the same cause of action, as it was in case No. 1,493, and that when a final decree in action in which the plaintiff has omitted to set out some right which he could have set out in his original action has been passed, such final decree is to be *res adjudicata* and is not to be made the subject of a litigation in a subsequent suit between the same parties. Taking this view of the law I would allow the appeal and dismiss the plaintiff's action with costs in both courts.

WENDT, J.—I agree with all that has fallen from my Lord. The principal objection to the plaintiff claiming the benefit of the leave to sue again given by this court on the former appeal is, that the present action was not brought in pursuance of that leave but had already been instituted by the plaintiff at his own risk after the dismissal of his first action in the District Court. If we are to consider whether irrespective of that leave the plaintiff could maintain the present suit, I should say that he cannot. The title which in the present suit he sets up to the land is one which admittedly he had, and knew he had, when he brought the former action. Yet he elected to say nothing about it, but to base his claim on a different title. His present title is clearly a " right of property " which he could have claimed, if not *pari passu*, at all events in the alternative in the former action. It not having been so claimed, the final decree in that action makes the matter a *res judicata* which cannot be litigated again between the same parties.