**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REUBLIC OF SRI LANKA**

Ukku Bandage Walli Ethana
Kiralogama, Galnewa.

**Plaintiff**

**Case No: CA 471/2000(F)**
**D.C. Anuradhapura Case No. 15467/L**

**Vs.**

Jayathu Ralalage Ranmenika
Kiralogama, Meegassema.

**Defendant**

**AND NOW BETWEEN**

Jayathu Ralalage Ranmenika
Kiralogama, Meegassema.

**Defendant-Appellant**

Wannihami Punchiralalage Gunasena
Kiralogama, Meegassema.

**Substituted-Defendant-Appellant**

**Vs.**

(Dead) Ukku Bandage Walli Ethana
Kiralogama, Galnewa.

**Plaintiff-Respondent**

1. Kiribandage Yogarathne
2. Kiribandage Piyasena
3. Kiribandage Gunasena
4. Kiribandage Manikhamy
5. Kiribandage Somarathne
6. Kiribandage Ukkuamma

All of Megassgama, Kiralogama

**Substituted-Plaintiff-Respondent**

**Before:** Janak De Silva J.

**Counsel:**

C. Sooriyaarachchi with C. Ratnayake for Substituted Defendant-Appellant

Sunil Watagala with Manodya Galpayage for Substituted-Plaintiff-Respondent

**Written Submissions tendered on:**

Substituted Defendant-Appellant on 08.11.2018

Substituted Plaintiff-Respondent on 26.10.2018 and 15.02.2019

**Argued on:** 18.01.2019

**Decided on:** 23.09.2019

**Janak De Silva J.**

This is an appeal against the judgment of the learned District Judge of Anuradhapura dated 06.07.2000.

The Plaintiff-Appellant filed the above styled action and sought a declaration that she is entitled to possess the land more fully described in the schedule to the plaint as the lawful lessee, an order of eviction against the Defendant-Respondent and all those possessing under her, damages and costs.

The learned District Judge entered judgment as prayed for in the plaint and hence this appeal.

The learned counsel for the Substituted Defendant-Appellant (Appellant) sought to assail the judgment on four main grounds.

***Res Judicata***

The Appellant submits that in view of the previous decisions in D.C. Anuradhapura case no. 10964/L, Court of Appeal case no. CA 58/96(F) and D.C. Anuradhapura case no. 14802/L the Plaintiff-Respondent (Respondent) cannot maintain the action on the doctrine of res judicata.

The learned District Judge held that this issue was answered in favour of the Respondent by his predecessor by order dated 25.09.1996 and as such the Appellant is estopped from raising this issue again.

There is doubt expressed by some jurists as to whether the doctrine of issue estoppel is covered by Section 40 of the Evidence Ordinance[1]. It appears that the Law Reform Commission recommended the amendment of Section 40 of the Evidence Ordinance by the addition of the clause, "For the purpose of this section, "suit" includes the determination of a question in a previously decided case" due to this reason.

However, the mere fact that Section 40 of the Evidence Ordinance does not provide for the application of the doctrine of issue estoppel in not determinative of its application in our law. The duty is cast upon this Court in terms of section 100 of the Evidence Ordinance to examine whether issue estoppel is part of English Law of Evidence and if so to apply it.

In *Thoday v. Thoday* [(1964) 1 All.E.R. 341, (1964) 2 W.L.R. 371, (1964) P. 181] Diplock L.J. stated that if in a litigation on a cause of action, which can only be established by proving that two or more different conditions are fulfilled, any issue whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on an admission by a party, neither party can, in subsequent litigation between them on any cause of action, which depends on the fulfillment of the identical condition, assert the opposite of what has been determined in the first litigation – that the condition was fulfilled or not fulfilled, as the case may be.

A more recent judicial exposition on the ambit of issue estoppel was made by Lord Keith in the House of Lords in *Arnold v. National Westminster Bank plc* [(1991) 2 A.C. 93] in a speech with which all the House concurred. He stated (at page 105):

> "issue may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

While the House of Lords in *Director of Public Prosecutions v. Humphrys* [(1976) 2 All.E.R. 497] held that issue estoppel does not apply in English criminal proceedings the House of Lords in *Mills v. Cooper* [(1967) 2 Q.B. 459] held that the doctrine applies in civil cases.

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[1] *The Law of Evidence*; E.R.S.R. Coomaraswamy; Vol. I, 550, 2nd Ed., (1989) Lake House Investments Ltd.

The application of the doctrine in civil cases is essentially concerned with preventing abuse of process. Accordingly, the decision of the House of Lords in *Arnold v. National Westminster Bank plc* (supra) shows that there are circumstances when a party will be entitled to re-open an issue which is covered by issue estoppel. Lord Keith of Kinkel, with whom all their Lordships agreed said (supra at 109):

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings."

A similar approach is adopted in the decision of the Supreme Court of Canada in *Penner v. Niagara (Regional Police Authority Service Board) and Others* [(2013) 2 SCR 125] in which Cromwell and Karakatsanis JJ, delivering the majority judgment of the court, said at paragraph 29:

> "The one [doctrine] relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice."

The following conditions must be fulfilled for the doctrine to apply[2]:

(i) Finality of the decision on the issue

(ii) The determination must be fundamental, not collateral

(iii) Identity of Parties

(iv) Same Capacity

(v) Precisely the same and identical issues or questions must have been decided

There is the further requirement that the particular issue should have been determined by a court of competent jurisdiction (Supra at 468).

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[2] *Supra.* 551

I hold that issue estoppel is part of English Law of Evidence in civil cases and in view of section 100 of the Evidence Ordinance it is part of our law in civil cases.

Issue no. 13 deals with the question of res judicata and the same issue was answered in favour of the Respondent previously by order dated 25.09.1996. That order fulfils the conditions necessary for the doctrine of issue estoppel to apply. Accordingly, I see no reason to interfere with the findings of the learned District Judge on that issue.

However, the learned counsel for the Appellant submitted that having accepted the issue on res judicata as issue no. 13 it was not possible for the learned District Judge to have disregarded that issue on the doctrine of issue estoppel.

I am not convinced on that point. In any event, the doctrine of res judicata has no application to the facts of the case.

D.C. Anuradhapura case no. 10964/L was instituted by the husband of the Respondent Kapuralalage Kiribanda as a possessory action. Judgment was entered in his favour in the District Court. However, in appeal the Court of Appeal in case no. 59/86(F) set aside the judgment of the District Court on the basis of prescription.

Section 40 of the Evidence Ordinance recognizes the doctrine of *res judicata* and the following constituents must be present for it to apply[3]:

(i) The former action must have been a regular action

(ii) The two actions must have been 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 have been in fact pronounced as alleged

(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

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[3] *The Law of Res Judicata*, G. Spencer Bower & Sir Alexander Turner, 2nd Ed., Section 19, pages 18-19 (1969) Butterworths London

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

D.C. Anuradhapura case no. 10964/L was a possessory action based on section 4 of the Prescription Ordinance. In a possessory action the question of title is immaterial. As Gratiaen J. held in *Perera v. Perera* (39 C.L.W. 100 at 101):

> "The test to be applied with regard to proof of possession *ut dominus* is a subjective test, and in possessory actions it is not appropriate to investigate title for the purpose of deciding whether or not a party's claim to possession of land is justified in law. The purpose of a possessory suit is not to adjudicate upon questions relating to title but to give speedy relief to a person who, claiming to be owner of property in his own right has been dispossessed otherwise than by process of law."

Wood Renton J. in *Fernando v. Fernando* (13 N.L.R. 164 at 165) held:

> "For the purposes of such an action as section 4 of Ordinance No. 22 of 1871 contemplates, it is not necessary that the plaintiff should set out a title sufficient to support an action *rei vindicatio*. He has to prove possession *ut dominus*, that is to say, as the term has been defined by a Bench of three Judges in the recent case of Abdul Aseez v. Abdul Rahiman [(1909) 1 Cur. L. R. 271.], he must have possessed not *alieno nomine*, but with the intention of holding and dealing with the property as his own, whereas here, he is a lessee for the full term of the lease"

However, in the present action the Respondent sought a declaration that she is entitled to possess the land more fully described in the schedule to the plaint as the lawful lessee. It is an action for declaration of title. As the two causes of action are different the plea on the doctrine of res judicata must fail on that ground alone.

D.C. Anuradhapura case no. 14802/L was filed by the Respondent in relation to the same corpus seeking a declaration that she is the lawful permit holder. To that extent the causes of action in that and the present action are the same. However, the Respondent withdrew D.C. Anuradhapura case no. 14802/L with liberty to file a fresh action subject to the payment of Rs. 1000/= as costs. The previous case must be decided on the merits for the doctrine of res judicata to apply [*Annamaly Chetty v. Thornhill* (34 N.L.R. 381)]. Hence D.C. Anuradhapura case no. 14802/L cannot apply as res judicata to the present action.

***Pre-Payment of Costs***

The learned counsel for the Appellant submitted that the Respondent was given permission to withdraw D.C. Anuradhapura case no. 14802/L with liberty to file fresh action on condition of a pre-payment order for Rs. 1000/=. It was submitted that since the Respondent failed to do so this action cannot be maintained. The Appellant relied on the decision in *Scriven & Co. v. Perera* (19 N.L.R. 503) where a plaintiff was allowed to withdraw an action with liberty to institute another on condition that he paid the defendant his costs before instituting a fresh action and the court held that the new action was not maintainable as the condition was not complied with.

The failure to make the pre-payment of costs was raised as a preliminary objection on 03.07.1996 and the learned District Judge rejected it on the basis that the pre-payment order did not specify the time at which it must be made.

The same issue is raised again as issue no. 9 and the learned District Judge held that it was not necessary to answer it on the doctrine of issue estoppel. I have earlier held that issue estoppel is part of our law of evidence in civil cases. The order made on 03.07.1996 fulfills the requirements necessary for the doctrine to apply in this case. Accordingly, I see no reason to interfere with the conclusions of the learned District Judge on this issue.

***Defects in the Permit***

The Appellant contended that the permit granted to the Respondent was defective. However, it is observed that no issue was raised on this matter at the trial. In any event, the learned District Judge has carefully examined this issue and held that there is no such defect. I see no reason to interfere with this conclusion.

***List of Witnesses and Documents***

The learned counsel for the Appellant submitted that the Respondent had failed to file a list of witnesses. The learned District Judge has considered this matter and made order on 25.11.1996 allowing the Appellant to file a list of witnesses and documents. I see no error in the order made by the learned District Judge.

For all the foregoing reasons, the appeal is dismissed with costs.

Judge of the Court of Appeal