1955 *Present :* Gratiaen, J., and Sansoni, J.

T. RAMAN Appellant, *and* N. MANICKAM *et al.*, Respondents

S. C. 129—D. C. Jaffna, 6,780

Res judicata —"*247 action*"—*Attachment of property—Previous litigation as to title between judgment-debtor and claimant—Rights of judgment-creditor—Execution purchaser is "privy" of judgment-debtor—Civil Procedure Code, s. 247.*

When property attached by a judgment-creditor is the subject of a claim in a "247 action", an earlier judgment upholding the claimant's title to it as against the judgment-debtor would operate as *res judicata* in favour of the claimant.

Kuda Banda v. Dingiri Banda (1911) 14 N. L. R. 145 and *Sawbrasegara v. Coomaraswamy* (1917) 4 C. W. R. 378, overruled.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, for the plaintiff appellant.

Joseph St. George, for the defendant respondent.

Cur. adv. vult.

March 14, 1955. GRATIAEN, J.—

This action was instituted under Section 247 of the Civil Procedure Code concerning a property which a judgment-creditor (the 1st respondent) had caused to be seized in execution of a money decree against his two judgment-debtors. The appellant objected to the seizure on the ground that he was its absolute owner. In due course, he instituted this action for a declaration *inter alia* that the property belonged exclusively to him and was not liable to be sold in execution of the 1st respondent's decree. The learned trial Judge dismissed the action and held that the property belonged to the 3rd respondent (the 2nd judgment-debtor) by virtue of a purchase in 1946 from the 2nd respondent (the 1st judgment-debtor).

The attachment of the property in dispute had been secured by the 1st respondent on 22nd March 1950. Nevertheless the learned Judge rejected the appellant's plea of *res judicata* based on a decree in his favour dated 16th September 1948 of the District Court of Jaffna (affirmed in appeal on 13th September 1949) in an action in which he had successfully vindicated his title to the property as against the 3rd respondent.

The state of the earlier decisions as to whether an attaching creditor in a "247 action" is bound by a judgment previously declaring the claimant entitled to the property as against the judgment-debtor is far from satisfactory. In *Kuda Banda v Dingiri Banda* [1] Lascelles, J., sitting alone, held that in such a situation the creditor (even though the seizure was effected after the date of the decree relied on as *res judicata*)

[1] *(1911) 14 N. L. R. 145.*

was nevertheless entitled to a fresh adjudication on the merits as to his judgment-debtor's title. Six years later, in *Pedrupillai v Dionisa* [1], Ennis, J., also sitting alone, expressed a strongly-worded opinion to the contrary, but ultimately disposed of the appeal on other grounds. Ennis, J. pointed out that certain English decisions relied on by Lascelles, J. related only to "estoppels *by conduct*" which bound the judgment-debtor personally but not his judgment-creditor "who was not a party to the estoppel". I respectfully agree that Lascelles, J. appears to have lost sight of the distinction between an estoppel which merely "gives rise to the application of equitable principles between man and man", and a so-called "estoppel *by record*" which, on grounds of public policy, prohibits *in limine* a second adjudication between the same parties (or their "privies") on the subject matter of the earlier *lis*.

Six days after *Pedrupillai's case* (supra) had been decided, a similar case came up before de Sampayo, J., also sitting alone, in *Sandrasegara v. Coomaraswamy* [2]. Unfortunately, his attention was not drawn to Ennis, J.'s recent dissent, and he followed *Kuda Banda's case* (supra) on the assumption that there was no judicial pronouncement to the contrary.

The rule of *stare decisis* does not require a Bench of two Judges to accept any of these conflicting single-Judge decisions as authoritative. We must therefore come to an independent conclusion on this controversial question. In my opinion, *Kuda Banda's case* and *Sandrasegara's case* (supra) ought to be over-ruled, and the view expressed by Ennis. J. in *Pedrupillai's case* (supra) should be adopted.

Drieberg, J. has incidentally explained in *Samaranayake v. Mendoris* [3] that a judgment-creditor in a 247 action "has to prove as against the claimant his debtor's right to the property *as fully as the debtor himself if the latter was seeking to vindicate his title against the claimant*". The ultimate object of execution proceedings under the Code is that, upon a judicial sale of the property attached, the right, title and interest of the judgment-debtor effectually passes to an execution-purchaser, while the purchase price (or a part of it) is paid to the creditor in satisfaction of his money decree. Under certain other statutes, the purchaser enjoys the special privilege of acquiring a better title than the judgment-debtor had possessed. Not so in the case of execution sales conducted under Chapter 22 of the Civil Procedure Code. Indeed, the purchaser may himself have the sale set aside under Section 284 on discovering that the debtor had "no saleable interest" in the property.

An execution purchaser at any rate is clearly a "privy" of the judgment-debtor for the purposes of the rule of *res judicata* except in cases where the attachment of the property had preceded the date of the judgment declaring that the judgment-debtor (or claimant as the case may be) had superior title. No doubt the Judicial Committee of the Privy Council has observed in *Dinendronath v. Sanniah Ramkumar Ghose* [4] that, unlike a private purchaser, an execution purchaser acquires the title of the judgment-debtor "by operation of law". Nevertheless, it is a derivative title passing to him by law from the judgment-debtor

[1] *(1917) 20 N. L. R. 143.*
[2] *(1917) 4 C. W. R. 378.*
[3] *(1928) 30 N. L. R. 203.*
[4] *(1881) I. L. R. 7 Cal. 107.*

and from no other source. Suppose therefore that the judgment-debtor had (before attachment) unsuccessfully sought to vindicate that title against the same claimant; it necessarily follows that, in a later litigation against the successful claimant, the execution purchaser would in effect be litigating under the same title. The relationship between judgment-debtor and execution purchaser in respect of the property contains all the essential elements of "privity of estate", so that the earlier judgment binds the privy to the same extent that it binds the parties themselves. It would be unjust and contrary to the spirit of the rule of *res judicata* to deny the claimant the fruits of his earlier victory, and to compel him to re-establish his rights a second time against the successor-in-title of his former adversary.

The relationship between the execution purchaser and judgment-debtor for the purposes of *res judicata* has now been explained. It is suggested, however, that the judgment-creditor is not a privy of the judgment-debtor in what de Sampayo, J. calls "the usual sense". *Sandrasegara's case* (supra) at page 381. I agree that the situation is not identical, because the judgment-creditor in a "247 action" does not claim that his debtor's title has already passed to him. But he does assert that the debtor enjoyed a saleable interest in the property at the date of its attachment; and for that reason he demands an execution sale at which that interest will pass to the highest bidder (perhaps himself) in exchange for valuable consideration, the whole or part of which must be applied in satisfaction of his decree.

At every stage of the present action, 1st respondent, as judgment-creditor, was litigating under a title identical with that which his debtor had asserted in the previous litigation against the appellant. Their relationship (in respect of the latter's title) was therefore sufficiently close to establish "privity" between them in a very real sense.

The rights conferred on a judgment-creditor upon the attachment of property in which the debtor is alleged to have a saleable interest closely resemble for all practical purposes a mortgage, even though the attachment may not strictly establish "an interest in land". *Ibrahim v. Hongkong and Shanghai Bank*[1]. The effect of the attachment is to confer on him a preferential right to the proceeds of the sale according to rules regulated by the Civil Procedure Code. See also *Wille on Mortgage* (1st ed.) 161–162. "Privity in estate or interest", having been established by operation of law, is the foundation of his power of attachment. In the absence of privity, the power could not exist. But in truth there is privity, and consequently the doctrine of *res judicata* either stands in his way or comes to his aid (according to the outcome of the previous litigation as to title between debtor and claimant).

The true principle has been very clearly explained in *Bigelow on Estoppel* (5th ed:) pp. 142–144, cited with approval in *Caspersz* pp. 162–3. "The ground of privity is a *property and not a personal relation*". An earlier judgment (which was conclusive against the judgment-debtor in respect of his title to the property subsequently seized in execution against him) is equally and to the same extent binding on the judgment-creditor at whose instance the property was attached and brought *in custodia legis* with a view to having it judicially sold for his benefit. Similarly, an

[1] *(1934) 37 N. L. R. 51.*

earlier judgment upholding the debtor's title as against a particular claimant would operate in a "247 action" as *res judicata* in favour of the judgment-creditor.

In the view that I have taken, there is really no need for any extension (on grounds of public policy) of the doctrine of *res judicata* as in *Dadalle Dharmalankara's case* [1]. In the present context the doctrine operates directly. A man who claims a right in virtue of someone else's title to property cannot repudiate its infirmities which have previously been judicially declared to exist in favour of a third party. *Cui sentit commodum sentire debet et onus.*

I would answer the issue as to *res judicata* against the 1st respondent. The judgment under appeal must therefore be set aside, and judgment entered in favour of the appellant as prayed for with costs in both Courts.

SANSONI, J.—I agree.

Appeal allowed.