[JOSEPHIDES, P.D.C.]

CHRISTOS HARALAMBOU BOYADJI of Pedoulas

Plaintiff

and

ELENI ANDREA PAPACHRISTOFOROU of Engomi

Defendant.

(District Court of Nicosia—Action No. 3081/57)

1958
Dec. 29

CHRISTOS H. BOYADJI
v.
ELENI A. PAPACHRISTOFOROU

Judgment—Res judicata—Estoppel only as between parties—Two exceptions to that rule: (1) as regards persons who are in "privity"—(2) as regards those who may have so acted as to preclude themselves from challenging the judgment, in which case there is estoppel by conduct —Privies—They are of three classes—The relationship of vendor and purchaser is included in the class of "privies in estate"*—Judgment—Setting aside of—When permissible.*

The plaintiff in this action is the brother of the defendant. The history of the litigation is as follows: By a contract of dowry dated the 29th July 1945 the mother of the parties undertook, *inter alia,* to transfer to her daughter—the defendant in the present action—a plot of land. The defendant daughter brought in the District Court of Nicosia action No. 2442/49 against her mother to enforce the dowry agreement. This action was settled on the 19th October 1951, by which settlement the mother undertook to effect the transfer of the plot in question to her daughter. The mother failed to comply with this term of the settlement and the plot remained registered in her name up and including the date of the judgment in the present action (which was delivered on the 29th December 1958). On the other hand, by an agreement with his mother, dated the 21st February 1952, the plaintiff agreed to buy from her the said same plot of land, he being well aware of the settlement referred to hereabove. The mother having failed to comply with the settlement viz. to transfer to her daughter the aforesaid plot, the latter instituted against the former action No. 280/55 in the District Court of Nicosia, and eventually a judgment was given on the 29th June 1957 in her favour directing the mother to transfer the plot to her daughter. The plaintiff in the present action was not a party either to the contract of dowry or to the litigation in action No. 280/55 just referred to between mother and daughter. But he was well aware of those proceedings. In fact, after the evidence had been closed and addresses made, but before judgment was delivered, on his application to the President of the Court, Vedad Dervish, P.D.C.,

he appeared before the Court, for the purpose of settling the whole dispute, but the President informed him that, since no settlement was reached, he was of no help because he was not a party to the action (viz. action No. 280/55). In fact he did not take any steps to be added as a litigant in that action. On the 26th September 1957, he instituted the present action against her sister (plaintiff in action No. 280/55) claiming, *inter alia,* : (a) the aforementioned plot of land which was the subject matter of the action No. 280/55 (between mother and daughter) and of the aforesaid agreement of sale of the 21st February 1952 between himself and his mother; (b) an order setting aside the judgment of the 29th June 1957 in the said same action. The defendant raised, *inter alia,* the defence of estoppel by *res judicata,* i.e. that, by reason of the judgment referred to above of the 29th June 1957 in action No. 280/55, between herself and her mother, the plantiff was precluded from claiming in the present action.

The learned President,—

Held : (1) Although he was not a party in the action No. 280/55 (*v. ante*) between his sister and his mother, still the plaintiff is in view of the judgment in that action (*v. ante*), estopped by *res judicata* from claiming in this case against the Defendant, his sister. He is privy of his mother, who was a party in action No. 280/55, because there is between them a relationship of vendor and purchaser on the foot of their agreement dated the 21st February 1952 (*v. ante*). He had, also, knowledge of the proceedings in that action and he had ample opportunity of applying to be joined as a party therein, but he has failed to take any steps in that regard.

(2) If it were necessary for the purposes of this case, in view of the decision of the Privy Council in *Nana Ofori Atta II* v. *Nana Abu Bonsra II* (1957) 3 W.L.R. 830, I would also hold that as the plaintiff's interest in this action is the same as that of his mother in Action No. 280/55, he is estopped by his conduct from litigating the issue all over again.

(3) Apart from certain judgments in default, judgments obtained by fraud or consent judgments in certain circumstances, or cases where there is jurisdiction to rescind judgments on discovery of new and material evidence, the Court has no power to set aside a judgment given in a previous case.

Action dismissed.

Cases referred to :

Nana Ofori Atta II v. *Nana Abu Bonsra II* (1957) 3 W.L.R. 830, P.C.

Jacques v. *Harrison* 12 Q.B.D. 165, C.A.

Birch v. *Birch* (1902) P. 130.

Chr. Mitsides for the plaintiff.

E. Emilianides for the defendant.

Only the portion of the judgment referring to the issues of *estoppel and of the setting aside* is reported.

J. P. JOSEPHIDES, P.D.C., after stating the facts, summary of which was given in the head-note, and after dealing with certain other aspects of the case, went on as follows: As regards the question of estoppel raised by the defence the general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties, a 'privy' as he is called, is bound equally with the parties, in which case he is *estopped by res judicata;* the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is *estopped by his conduct* (see *Nana Ofori Atta II* v. *Nana Abu Bonsra II* (1957) 3 W.L.R. 830 at p. 834).

A judgment *inter partes* raises an estoppel only against the parties to the proceeding in which it is given, and their privies, for example, those claiming or deriving title under them. As against all other persons it is *res inter alios acta,* and with certain exceptions, though conclusive of the fact that the judgment was obtained and of its terms, is not even admissible evidence of the facts established by it. Privies are of three classes, and the relationship of vendor and purchaser is included in the class of "privies in estate" (*see* 15 Halsbury's Laws, third edition, paragraph 372, p. 196).

In this case there is no doubt that the plaintiff would derive title under his mother if such title was recognisable under the Cyprus Law. As the plaintiff's claim is based on the purchase from his mother, he is a privy of his mother who was a party to Action No. 280/55 and he is, therefore, estopped from raising the same issue in another action. He had knowledge of those proceedings, he had ample opportunity of applying to be joined as a party, but he has failed to take any action and his mother has not appealed against that judgment. For all these reasons plaintiff is estopped by *res judicata* from claiming in this case.

If it were necessary for the purposes of this case, in view of the decision of the Privy Council in *Nana Ofori Atta II* v.

Nana Abu Bonsra II (1957) 3 W.L.R. 830, I would also hold that as the plaintiff's interest in this action is the same as that of his mother in Action No. 280/55, he is estopped by his conduct from litigating the issue all over again..... Finally, as to the plaintiff's claim that this Court should set aside the judgment given by the District Court of Nicosia in Action No. 280/55, when plaintiff's Counsel was invited by Court to support his submission by an authority he stated that he based this claim on the inherent power of the Court and on a proposition stated under the heading "Application by person not a party" in a note to Order 27, rule 15 of the English Rules of the Supreme Court, in the Annual Practice 1955. That note is based on the case of *Jacques* v. *Harrison* 12 Q.B.D. 165, C.A. But the English Order 27, rule 15, to which this note is appended and which corresponds to our Order 26, rules 14 and 15, refers to the setting aside of judgments obtained by default and the judgment in Action No. 280/55 was not obtained by default.

It seems that apart from the power to correct clerical or accidental mistakes in judgments and to set aside certain judgments in default, the Court has power to set aside judgments obtained by fraud (*see* our Order 33, rule 15, and *Birch* v. *Birch*, (1902) P. 130), to rescind a judgment on discovery of new and material evidence, and to set aside consent judgments in certain circumstances (*see* 22 Halsbury's Laws, 3rd edition, paragraphs 1664—1674, pp. 784—793); but, so far as my researches could carry me, apart from the above cases, it would seem that the Court has no power to set aside a judgment given in a previous case. The more so in a case like the present one, where the plaintiff was not a party to the first action, and the one plaintiff (the sister's husband) and the defendants (the father and mother) in the first action are not parties to the second action, i.e. the present case.

For all these reasons the plaintiff's claim fails and is dismissed with costs.

Action dismissed with costs.