

RAMASAMI  
v.  
SUBBUSAMI

claimed in the suit. The Court fees payable must, therefore, be calculated on this amount.

The appellant is allowed six weeks within which to pay the deficient Court fees.

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## APPELLATE CIVIL.

*Before Mr. Justice Handley and Mr. Justice Weir.*

SHAIK SAHEB (PLAINTIFF), APPELLANT,

v.

MAHOMED AND ANOTHER (DEFENDANTS), RESPONDENTS.\*

*Civil Procedure Code—Act XIV of 1882, ss. 13, 102, 153—Failure to pay  
Commissioner's fee—Res judicata.*

A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land. No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land :

*Held*, that the claim was not *res judicata*.

SECOND APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 387 of 1888 reversing the decree of V. Subramania Sastri, District Munsif of Poonamallee, in original suit No. 107 of 1887.

Suit to recover possession of certain land. It appeared that in original suit No. 13 of 1886 on the file of the District Munsif of Poonamallee the plaintiffs had sued to eject the defendants from the same land ; that a question having arisen as to the valuation of that suit, the plaintiff was ordered to pay a fee for a commissioner to be appointed to value the land, and that the plaintiff having failed to comply with this order, the suit was dismissed, no issues having been framed.

The District Munsif passed a decree as prayed, holding that the suit of 1886 was no bar to the present suit. Upon this question he referred to *Ahar v. Seshamma*(1), *Venkatachalam v. Mahalakshmanamma*(2), *Shankar Baksh v. Daya Shankar*(3), *Ganesh Rai*

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\* Second Appeal No. 964 of 1889.

(2) I.L.R., 10 Mad., 272.

(1) I.L.R., 10 Mad., 270.

(3) I.L.R., 15 Cal., 422.

v. *Kacka Prasad*(1), *Kudrat v. Dinu*(2) and expressed the opinion SHAIK SAHEB  
v.  
MAHOMED. that the suit had not been disposed of under Civil Procedure Code, s. 102, which was not alluded to in the order of dismissal, but under section 158; and in that view he held that the matter in dispute was not *res judicata* under section 13, because the issues arising in the suit had not been heard and determined.

The District Judge on appeal reversed the decree of the District Munsif, holding that the present suit was barred, whether the suit of 1886 was dismissed under section 102 or section 158.

The plaintiff preferred this second appeal.

*Sundara Ayyar* for appellant.

*Balaji Rau* for respondents.

JUDGMENT.—We are of opinion that the District Judge has erred in holding that the suit is *res judicata*. Without expressing an opinion on the decision relied on by the District Judge, *Vencatachalam v. Mahalakshamma*(3), we are of opinion that the circumstances of the former suit did not fall under section 158 of the Civil Procedure Code, inasmuch as, although there was a default in respect of paying the commissioner's fee, it appears that no time was granted, or in other words no date was fixed within which the fee should be paid. We think the somewhat stringent provisions of this section cannot be put in force unless the party has had distinct notice in respect of *time*, of what is required of him, and that default in the matter of time (compare *Ramaya v. Rangaya*(4), is of the essence of the particular kind of default contemplated. In the present case an order was made in general terms that the commissioner's fee should be paid and the suit was adjourned to a certain date for inquiry.

As there was in our opinion no such default as is provided for in section 158 of the code, we must hold that the case was not dealt with under that section, and that therefore the suit now brought is not governed by the opinion expressed in *Vencatachalam v. Mahalakshamma*(3). It is clear also from exhibit VI that the case was not disposed of under section 102 of the code.

We must therefore take it that the former suit was not disposed of under any of the special sections of the code which raise a statu-

(1) I.L.R., 5 All., 595.

(3) I.L.R., 10 Mad., 272.

(2) I.L.R., 9 All., 155.

(4) I.L.R., 7 Mad., 41.

SHAIK SAHEB v. MAHOMED. tory bar to the present suit, and as it was not adjudicated on the merits, it cannot be barred under section 13 of the code.

For the reasons stated we allow the appeal and reverse the District Judge's decision and remand the appeal for retrial on the merits.

The costs of the suit and appeal will abide the result. Appellant will have his costs in this second appeal.

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## APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard. e.

SAMBASIVA (PLAINTIFF), APPELLANT,

v.

RAGAVA (DEFENDANT No. 44), RESPONDENT.\*

*Limitation—Act XIV of 1859, s. 1, cl. 12—Act XV of 1877, sched. II, art. 141—  
Hindu Law—Suit by reversioner on expiry of widow's and daughter's estate.*

Plaintiff sued in 1887 to recover property as part of the estate of his maternal grandfather, who died about 1845, leaving (1) a widow, who inherited the property and died in 1846, (2) his daughter by her, who took the property on her mother's death and alienated it to the defendants about 1850 and died before suit, and (3) the plaintiff's mother, who was his daughter by another wife. The plaintiff's mother made no claim on the property and died in 1883 :

*Held*, the suit was not barred by limitation.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 758 of 1888 modifying the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 12 of 1887.

The plaintiff sued in 1887 as reversioner to recover possession of certain immoveable properties that had belonged to his grandfather Venkatachalla and thence descended to his widow Thevanai and thence to his daughter Bapu, who was a half-sister of plaintiff's mother Swarnam, a daughter of Venkatachalla by another wife. Bapu inherited the property about the year 1846 and about 1850 made alienations of it to the defendants. Her half-sister Swarnam, plaintiff's mother, who was entitled to joint

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\* Second Appeal No. 962 of 1889.