

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

NAGATHAL (PLAINTIFF), APPELLANT,

v.

PONNUSAMI (DEFENDANT), RESPONDENT.*

1889.
August 13.

Civil Procedure Code, s. 13—Res judicata—Cause of action—Limitation Act—Act XV of 1877, seh. II, art. 91—Suit to cancel a document.

On 23rd March 1878 plaintiff executed to defendant a document purporting to be a deed of gift. In 1886 plaintiff sued to cancel the document alleging that defendant on 11th May 1881 had agreed to execute a release but had not done so: that suit was dismissed for non-payment of duty due under the Court Fees Act.

The plaintiff now sued in 1887 for a declaration that the document "was executed for nominal purposes and was not intended to take effect."

Held, (1) that since the cause of action in the suits of 1886 and 1887 were not the same, the claim in the latter suit was not *res judicata*;

(2) that the suit was not barred by limitation.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 204 of 1888, affirming the decree of S. Subbayar, District Munsif of Negapatam, in original suit No. 62 of 1887.

The plaintiff was a Hindu widow, and the defendant, her daughter's husband. On 23rd March 1878, the plaintiff executed in the defendant's favor a deed of gift, which confirmed an oral gift of certain property she had made to him at the marriage of her daughter in 1866, and recited that he has been in possession of the property from the date of gift.

In original suit No. 12 of 1886, the plaintiff had sued the defendant for the cancellation of the deed of gift. She then alleged that the possession of the property never passed to the defendant, and that, on 11th May 1881, he had agreed to execute a release, but that he failed to do so. The cause of action was stated to have arisen on 12th May 1881. The plaint had been stamped with a court fee stamp of Rs. 10; and the Court directed the plaintiff to pay the Court fee on the value of the

* Second Appeal No. 1728 of 1888.

property, which was Rs. 1,500. She failed to pay this amount and the suit was dismissed under clause II, section 10, of the Court Fees Act.

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This suit was brought by the plaintiff against the defendant to obtain a declaration that the deed of gift was "nominally executed and was not intended to take effect." She alleged in the plaint that the deed of gift was cancelled, the defendant having returned the same to her; that since the beginning of December 1885, he had been setting up his right to the property on the strength of the deed being registered and denying her title to the same, &c.

Defendant contended that the claim was barred; that the deed of gift was not cancelled, and that this second suit was brought in the present form in order to evade the Court fee.

The District Munsif dismissed the suit holding that the claim was barred under sections 13 and 43 of the Code of Civil Procedure, and the Subordinate Judge affirmed his decree. The plaintiff preferred this second appeal.

Subramanya Ayyar for appellant.

Sudagopa Charyar for respondent.

The Court delivered the following

JUDGMENT:—Though the relief sought in both suits is substantially the same, the cause of action put forward is different. In the former suit the cause of action was alleged to be the refusal in 1881 of defendant to execute a document; in the latter, the claims to the property advanced by the defendant in 1885. The relief sought is not the cancellation of the document (as to which article 91 of the Limitation Act would apply,) but a declaration that the document was only nominally executed. The plaintiff was in possession of the document and the property, and could only want a declaration. There is no *res judicata*, and it is admitted, on appeal, that section 43 of the Code of Civil Procedure does not apply, nor will the dismissal of the former suit for non-payment of Court fees bar this suit.

We must reverse the decrees of the Courts below, and remand the suit to the Court of first instance for disposal on the merits.

The costs will abide and follow the result.