APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1887. Dec. 6.

VENKAYYA (DEFENDANT, No. 3), APPELLANT,

and

NARASAMMA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 13—Res judicata—*Issue decided in former suit, in which parties were rival defendants claiming under different titles.*

B. sued L.N. and P.V. to recover certain property claimed under a nuncupative will of his father N. P.V. denied the will and alleged that the property was ancestral and had vested in him by survivorship. L.N. set up title to the property under a will in writing executed by N. and denied the title both of B. and of P.V. The question whether P.V. was divided or not from N. was tried. It was found that the will in writing was valid, that P.V. was divided, and that B's title was not proved. In a suit by L.N. against P.V. to recover certain land granted to her by the will executed by N.:

Held that the question whether P.V. was divided from N. was *res judicata* under s. 13 of the Code of Civil Procedure by reason of the decision in the former suit, although in that suit P.V. and L.N. were both defendants.

APPEAL from the decree of T. Ramasámi Ayyangár, Subordinate Judge at Cocanada, confirming the decree of A. F. Elliot, District Múnsif of Cocanada, in suit No. 373 of 1883.

The facts of this case appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

Bháshyam Ayyangár for appellant.

Subba Rau for respondent.

JUDGMENT.—The respondent's mother, Lakshmi Narasamma, the original plaintiff, instituted the present suit to recover certain property under a will left by her late father, Narasayya. The appellant, Venkayya, resisted her claim on the grounds that he was the undivided nephew of Narasayya and that the property in suit was ancestral property. The lower courts have found that the will set up by the respondent's mother is true and that the contention that the appellant was undivided could not be set up in this suit, he being concluded by the decision in Original Suit No. 314 of 1878.

* Second Appeal No. 397 of 1886.

It is urged, in second appeal, that the appellant and the respondent's mother were only defendants in that suit and that the adjudication on the question of division or non-division as between the then plaintiff and the present appellant was not material to the decision in that suit.

Original suit 314 of 1878 was brought by Bapanamma, another daughter of Narasayya, against the respondent's mother, the present appellant, and others, to recover certain property on the ground that it had been orally devised to her by her father. Her claim was resisted both by the present appellant and by the respondent's mother, the former alleging, *inter alia*, that the property then in suit was ancestral and that Narasayya was his undivided uncle; and the latter that a written will had been left by her father and that the lands claimed in that suit had not been devised to the then plaintiff, that the nuncupative will or oral testamentary disposition of property was untrue. She further pleaded generally that the present appellant was in no way entitled to the property.

It is clear that, although the appellant and the respondent's mother were co-defendants in the former suit, their contentions were hostile to one another, the daughters, on the one hand, claiming to take under their father's will; whilst the nephew, on the other hand, denied both the *factum* of the will and its validity on the grounds that there was a subsisting coparcenary and that the property was ancestral. The second issue recorded in the previous suit, namely, whether the appellant before us was divided from Narasayya was material to the joint contentions of the plaintiff and the present respondent's mother. Our attention was also drawn to the fact that the respondent's mother produced certain pattás standing in the name of her late father, which were relied on by the District Múnsif in his judgment as some evidence of partition.

Upon these facts, we are of opinion that the Subordinate Judge was right in holding the appellant to be debarred from raising in the present suit the question of division or non-division and that the appellant is concluded by the finding on that issue in the previous suit.

Two objections are urged in appeal against that decision by the appellant's pleader. The first is that, inasmuch as the former suit was dismissed and there was a finding that the oral will set up by the plaintiff in that suit was not true, the finding that

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Venkayya was divided nephew was not necessary to the decision in that suit. The second objection is that, as the present appellant and the respondent's mother were only co-defendants, there was no trial as between them with reference to that issue.

As to the first objection, it is provided by s. 13 of the Civil Procedure Code that no court shall try . . . . any *issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties "litigating under the same title."

It was incumbent on the plaintiff in the former suit to show, before she could claim a decree, that there was an oral will, as alleged by her, that her father was divided from his brother and that there was no written will, or that the oral will prevailed against the written will; and we cannot say that the issue as to division or non-division was not material to the ground of claim in that suit, nor are we prepared to adopt the suggestion that it was not material to the decision actually recorded in that suit, for the Subordinate Judge based his decision in appeal on the grounds that the written will was proved, that the oral will was not proved, that division was proved, and that the written will was valid, and that the property then in suit was not devised under it to the then plaintiff.

As to the second objection, it is not disputed that, although a plaintiff and a defendant may have been co-defendants in a former suit, a matter in dispute between them in a subsequent suit may have formed the subject of active controversy in the former suit so as to preclude them from raising the same question in the subsequent suit.

In the case before us, the question whether the respondent's mother's father and the appellant were divided or undivided was a matter directly and substantially in issue in the former suit, regard being had to the title then litigated as between the appellant and the respondent's mother, and it is also in evidence that the latter took an active part in making good her contention by producing in evidence documents which were used as evidence of partition.

We are of opinion then that the position of the respondent's mother in the former suit, though formally defendant in that suit was not that of a party taking no active part in the contest between the then plaintiff and the appellant before us.

As to the contention that the finding in the former suit against the truth and validity of the oral will was sufficient for the dismissal of that suit, there is nothing before us to show that the claim was disallowed on that ground only. In *Krishna Behari Roy* v. *Brojeswari Chowdranee*(1), the Judicial Committee of the Privy Council observed that the adjudication on the question of adoption in a previous suit concluded the party claiming to be adopted in a subsequent suit, although the decision in the former suit proceeded on the finding that a patni lease granted by the mother of the plaintiff was not in excess of her powers as a widow, and although the determination that the adoption was true was not necessary to the dismissal of the claim, though it would certainly be material to the ground of claim.

We are, therefore, of opinion that this second appeal must fail, and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

VENKATACHALAM (PLAINTIFF), APPELLANT,

and

VENKATAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887. Sept. 6, 13.

Limitation Act XIV of 1859, *s.* 1, *cls.* 9, 10, 16.

The period of limitation applicable under Act XIV of 1859 to suits upon written instruments which could not have been registered under the law in force at the time of execution of such instruments is six years under cl. 16 of s. 1 of the said Act.

APPEAL from the decree of W. F. Grahame, Acting District Judge of Cuddapah, confirming the decree of S. Dorasámi Ayyangár, District Múnsif of Cuddapah, in suit No. 176 of 1884.

This appeal was reheard after an application for review of judgment had been granted on 1st February 1886.

The Acting Advocate-General (Mr. *Spring Branson*) and *Balaji Ráu* for appellant.

Rama Ráu for respondents.

The facts necessary, for the purpose of this report, appear from the judgments of the Court (Brandt and Parker, JJ.).

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(1) L.R., 2 I.A., 283.

* Second Appeal No. 483 of 1885.