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Head Assistant Collector, referred to by the defendants, was made under any legal authority, and could as such, be held to be binding, it might bar the suit, but we are not referred to any legal enactment which would justify our treating the order as being conclusive. The mere fact that such an order was made can have no greater force than the expression of an opinion by a revenue officer.

The decision in *Durga Pershad* v. *Ghosita Goria*(1) is only authority for the proposition that article 120 of schedule II of the Limitation Act is applicable to a suit by a tenant against his landlord for apportionment of the rent payable to such landlord for the portion of land obtained by him on partition, out of what had theretofore been held by the tenant under all the co-shares jointly.

The present is not a suit between tenant and landlord, but by a proprietor against other proprietors for apportionment of the assessment on lands included in a single patta. The decision in *Durga Pershad* v. *Ghosita Goria*(1) is therefore not in point.

In allowance of this appeal, we set aside the decrees of both the Courts below and remand the suit to the District Munsif for replacement on his file and disposal according to law.

The costs of this appeal and in the Lower Appellate Court will be paid to the plaintiff by defendants Nos. 2 to 5.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

1891. Dec. 10, 11. 1892. February 24.

KUNJI AMMA AND OTHERS (PLAINTIFFS NOS. 2 to 5, 7 to 15, 17 to 19, 22 to 47), APPELLANTS,

v.

RAMAN MENON AND OTHERS (DEFENDANTS NOS. 5, 7, 3, 8 to 60), RESPONDENTS.*

Civil Procedure Code, s. 13—"Res judicata"—*Court of competent jurisdiction*—*Act X of* 1877, s. 433—*Suit against a Sovereign Prince.*

A suit for a declaration of the title of the plaintiffs' tarwad to certain land was filed in a District Court against the Maharaja of Cochin and others, including the

(1) I.L.R., 11 Cal., 284.

* Appeal No. 156 of 1890.

trustees of a devasom. It appeared that the same land was the subject of suit instituted in a Subordinate Court on the 6th August 1877, to which the representatives of both the plaintiffs' tarwad and the devasom were parties, and that the land was then found to be the property of the devasom and a decree was passed accordingly. It was contended that the present claim was not *res judicata* by reason of that decree, because, under the provision of Act X of 1877, s. 443, which came into operation during the pendency of that suit, no Sovereign Prince could be sued in any Court subordinate to a District Court, and the Court which passed that decree was not therefore "a Court of jurisdiction competent to try" the present suit within the meaning of Civil Procedure Code, s. 13:

Held, that, although these words must be taken to refer to the jurisdiction of the Court at the time the suit was heard and determined, yet the present claim was *res judicata* since the title to the land was a matter in issue within the cognizance of the Subordinate Judge and was adjudicated on by him.

APPEAL against the decree of L. Moore, District Judge of South Malabar, in original suit No. 2 of 1883.

Suit against the Maharaja of Cochin and others for a declaration that certain land was the property of the plaintiffs' tarwad and for other reliefs.

In 1874, the then karnavan of the plaintiffs' tarwad, executed a kyohit to the Vadakunathan devasom, whereby he acknowledged property now in suit to be the jenm of the devasom. The plaintiffs now alleged that this kychit was executed in fraud of their tarwad and was not binding on it. In original suit No. 28 of 1877, on the file of the Subordinate Court, Calicut, a suit was brought against the then karnavan of the plaintiffs' tarwad on the footing of this document and a decree obtained on behalf of the devasom. Act X of 1877 came into operation during the pendency of that suit. Defendants Nos. 1, 2 and 3 in this suit were the successors in office of plaintiffs Nos. 1 and 2, in the suit of 1877, and the plea was now raised that the present claim was *res judicata* by reason of that decree. This contention was upheld by the District Judge who dismissed the suit.

The plaintiffs preferred this appeal.

Ramachandra Ayyar for appellants.

Sadagopachariar and *Sankaran Nayar* for respondents.

JUDGMENT.—The only question we are called upon to determine in this appeal is whether the Court, which tried original suit No. 28 of 1877, was competent to try the present suit within the meaning of section 13 of the Civil Procedure Code.

Original suit No. 28 of 1877 was a suit instituted in the Court of the Subordinate Judge on behalf of the Vadakunathan

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devasom to recover certain property from the family of the plaintiffs in the present suit. The main question for decision in that suit, as it is in the present suit, was whether the land in suit was the jenm of the devasom or of the tarwad to which the plaintiffs belong. That was a suit on behalf of the devasom, this is a suit against the devasom. It is argued that, inasmuch as the Raja of Cochin is a party-defendant in the present suit, the Subordinate Court, which tried original suit No. 28 of 1877, was not "a Court of jurisdiction competent to try" the present suit, and that therefore section 13 has no application.

Original suit No. 28 of 1877 was instituted in the Subordinate Court on the 6th August 1877, but it was not heard and determined until January 1878. Act X of 1877 came into force on the 1st October 1877, and, by section 433, it was enacted that a Sovereign Prince or ruling chief could not be sued in any Court subordinate to a District Court. It is in consequence of this provision of law that the present suit was instituted in the District Court.

It has been argued that, as, at the time when original suit No. 28 of 1877 was instituted, there was no provision of law which prohibited the entertainment of a suit against a Sovereign Prince by the Subordinate Court, the present suit was one which might have been instituted in the Court of the Subordinate Judge. The words of section 13 are "Court of jurisdiction competent to try such subsequent suit," and we are of opinion that the only reasonable construction, which can be placed upon these words, is that they must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined. This is also the view of the Calcutta High Court in *Gopi Nath Chobey* v. *Bhugwat Pershad*(1) and *Raghunath Panjah* v. *Issur Chunder Chowdhry*(2).

Are we then to hold that, because, the Subordinate Court was not competent to entertain the present suit by reason of the Raja at Cochin being a party-defendant, it is not a Court of jurisdiction competent to try such within the meaning of section 13? We think not. Those words have been interpreted by their Lordships of the Privy Council to mean a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the

(1) I.L.R., 10 Cal., 697. (2) I.L.R., 11 Cal., 153.

subject matter of the suit or the pecuniary limits of its jurisdiction. *Misir Raghobardial* v. *Sheo Baksh Singh*(1).

It is not and cannot be contended that the Court of the Subordinate Judge has not concurrent jurisdiction with the District Court, both as regards the subject matter of the present suit and the pecuniary limit of its jurisdiction, for the jurisdiction both of the District Judge and of the Subordinate Judge extend to all original suits and proceedings of a civil nature (section 12, Act III of 1873).

It is the "matter in issue" in the suit that forms the essential test of *res judicata* (*Pahlwan Singh* v. *Risal Singh*(2)). The matter in issue in the present suit, viz., the title of the tarwad or of the devasom was one within the cognizance of the Subordinate Court, and, it having been decided in the former suit, we do not think that the plaintiffs are entitled, by merely adding the Raja of Cochin as a party-defendant, to call upon the District Court to decide an issue which has already been decided by a Court of concurrent jurisdiction.

We are fortified in this opinion by the ruling of the Privy Council, in the case of *Soorjomonee Dayee* v. *Suddanund Mohapatter*(3).

That was a judgment with reference to the second clause of Act VIII of 1859 which corresponded with section 13 of the present Act. Their Lordships were of opinion that the term cause of action in that section was to be construed with reference rather to the substance than to the form of action.

This appeal therefore fails and must be dismissed with costs.

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(1) I.L.R., 9 Cal., 439. (2) I.L.R., 4 All., 55. (3) 12 B.L.R., 304.