APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

1895. February 20. March 12. April 2.

PETHAPERUMAL CHETTI (PLAINTIFF), PETITIONER,

v.

MURUGANDI SERVAIGARAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 13, 158—*Dismissal of suit for want of heirship certificate*—Res judicata.

In a suit to recover principal and interest due on a bond executed by the defendants in favour of the plaintiff's father (deceased), it appeared that the plaintiff had previously brought a similar suit which was dismissed for the reason that the plaintiff produced no succession certificate:

Held, that the previous proceedings did not bar the present suit.

PETITION under Provincial Small Cause Courts' Act, 1887, section 25, praying the High Court to revise the proceedings of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in small cause suit No. 1211 of 1893.

The facts of the case are stated above sufficiently for the purpose of this report.

The Subordinate Judge held that the previous proceedings constituted a bar to the present suit which he accordingly dismissed.

The plaintiff preferred this petition.

Krishnaswami Ayyar for petitioner.

Tiagaraja Ayyar for respondents.

JUDGMENT.—The Subordinate Judge, being of opinion that the dismissal of the plaintiff's (petitioner's) previous suit No. 1158 of 1892 for non-production of a certificate of heirship was a dismissal under section 158, Civil Procedure Code, has held that the plaintiff's present suit on the same cause of action is barred.

The Subordinate Judge's decision is questioned on behalf of the plaintiff on two grounds:—

The first is that, assuming, for argument's sake, that the dismissal was on account of the plaintiff's omission to produce a certificate, the case did not fall under section 158, Civil Procedure Code.

* Civil Revision Petition No. 125 of 1894.

Now the rejection of a suit to operate as a bar to the entertainment of a subsequent suit on the same cause of action must rest either on a statutory prohibition similar to that contained in section 103, Civil Procedure Code, or on the principle of *res judicata*. But there is no specific provision in the Code laying down that a dismissal under section 158 shall be a bar to a second suit on the same cause of action. It has, however, been held that when a Court, acting properly under section 158, dismisses a suit, such dismissal is tantamount to *res judicata*; see *Venkatachalam* v. *Mahalakshmamma*(1) which was decided with reference to section 148 of Act VIII of 1859, corresponding to section 158 of the present Code. In that case Muttusami Ayyar and Parker, JJ., observed thus:—"As to the contention that section 148 did not "expressly prohibit a second suit, it should be remembered that it "directed that the Court might proceed to decide the suit notwith-"standing the default constituting thereby the decision on the "imperfect material on the record into a decree on the merits, "which, under section 13, would bar a second suit. No express "rule of prohibition is inserted, because the decision is a decree on "the merits and not a mere judgment by default." Whether Handley and Weir, JJ., in *Shaik Saheb* v. *Mahomed*(2) intended to throw any doubt on *Venkatachalam* v. *Mahalakshmamma*(1) is not quite clear. However that may be, I must follow the construction adopted in the latter case. Now, as a decision under section 158, though passed on imperfect materials, is yet to be treated as one on the merits, no decision can be held to have been arrived at under that section unless the circumstances of the case were in point of law, such as to permit the Court to pronounce on the merits, had the necessary materials for doing so been before it. But the non-production of a certificate of heirship is not a failure to adduce evidence in a case where a Court is at liberty to determine the merits, but an omission to do that without which the tribunal is precluded from entering into the merits at all. Consequently the dismissal of a suit for such a cause cannot be taken as a decree under section 158. The present case is analogous to *Putali Meheti* v. *Tulja*(3), where West and Pinhey, JJ., ruled that the rejection of a previous suit for the plaintiff's omission to produce a certificate of the Collector under section 6 of the Pensions Act did not

(1) I.L.R., 10 Mad., 272. (2) I.L.R., 13 Mad., 510.
(3) I.L.R., 3 Bom., 223.

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bar a second suit on the same cause of action. West, J., said:—"When a suit has failed through a formal defect, and the merits "have not been so pronounced on as to constitute a legal relation "resting on the act of the Court, another suit is not, by the "English law, barred. This rule is consonant to justice and "agrees with the law as set forth in the Code of Civil Procedure."

It cannot be said that the analogy between a case where a plaintiff omits to produce the Collector's certificate under the Pensions Act and a case where he fails to produce a succession certificate required by Act VII of 1889 is incomplete, because in the former case the absence of the Collector's certificate prevents a Court from taking cognizance of the claim (section 6 of Act XXIII of 1871), whereas in the latter, a Court is precluded from passing a decree except on the production of a certificate (section 4, Act VII of 1889). For, in *Nawab Muhammad Azmat Ali Khan* v. *Mussumat Lalli Begum*(1), it was held by the Privy Council that a suit relating to a grant of property within the meaning of the Pensions Act need not be dismissed, because no certificate had been obtained before the commencement thereof. And even this decision apart, it appears to me that the real effect of a failure to produce a certificate in either case, whether such production should take place at the institution of a suit or at some later stage, is to prevent a Court from pronouncing on the merits so as to render its decision an adjudication having the force of *res judicata*. I think, therefore, that the dismissal of the petitioner's suit of 1892, assuming that it was due to his omission to produce a succession certificate, is not a bar to the present claim.

This being my view it is unnecessary to consider the other contention raised by the petitioner, viz., that the Subordinate Judge was wrong in holding that time had been granted to him within the meaning of section 158,—even if that section were held applicable to the circumstances of the suit of 1892.

The decree of the Subordinate Judge is set aside and the suit should be restored to the file and dealt with according to law. The costs of this petition will abide and follow the result and be provided for in the revised decree.

(1) L.R., 9 I.A., 8.