

## APPELLATE CIVIL—FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Davies and  
Mr. Justice Sankaran Nair.*

SOMASUNDARA MUDALI (FIRST DEFENDANT), APPELLANT,

2.

KULANDAIVELU PILLAI (PLAINTIFF), RESPONDENT.\*

1904.  
September  
5, 6, 14, 21.  
October 13.

*Civil Procedure Code—Act XIV of 1882, s. 13, expl. V, s. 26—Res judicata—  
'Right to relief' under s. 26 in previous suit essential to bar under expl. V  
of s. 13.*

Where some co-sharers sue to recover the whole property joining as a defendant a sharer who refused to join as plaintiff and who remained *ex parte* and a decree was passed in favour of the plaintiffs awarding to them their shares alone, such suit must be considered to have been brought by the plaintiffs for their shares alone and the defendant-sharer or his representative cannot as a plaintiff in a subsequent suit against a co-defendant in the prior suit rely on the judgment as a bar under section 13, explanation V of the Code of Civil Procedure on the ground that the plaintiffs in the previous suit claimed a relief common to them and the defendant co-sharer.

*Chandu v. Kunhamed*, (I.L.R., 14 Mad., 324), overruled.

*Latchanna v. Saravayya*, (I.L.R., 18 Mad., 164), not followed.

A right to relief can be said to be 'claimed in common' under explanation V to section 13 of the Code of Civil Procedure, only as between parties who would be benefited by such relief if granted and who have such an interest in the relief claimed that they could join as co-plaintiffs under section 26 of the Code of Civil Procedure.

A suit cannot be maintained by one person on behalf of others standing in the same relation with him in the subject of the action, unless the relief sought by him is beneficial to those whom he seeks to represent and such others are necessarily interested in the relief sought.

*Gopaiyyan v. Raghupati Ayyan alias Aiyarayan*, (3 M.H.C.R., 217), *Nabin Chandra Mazumdar v. Muktasundari Debi*, (7 B.L.R., App. 38), *Surender Nath Pal Chowdhry v. Erojo Nath Pal Chowdhry*, (I.L.R., 13 Calc., 352), referred to and followed.

*Nadhavan v. Keshavan*, (I.L.R., 11 Mad., 191), distinguished.

Suit by mortgagee and auction-purchaser to recover possession of property. The defendants Nos. 2, 3, 4 and 5 were brothers and the sons of one Soku Mudali. In Original Suit No. 321 of 1893 on the file of the District Munsif of Kulitalai, the present

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\* Second Appeal No. 895 of 1903, presented against the decree of H. G. Joseph, Esq., District Judge of Trichinopoly, in Appeal Suit No. 112 of 1902, presented against the decree of M.R.By. S. Ramaswami Aiyangar, District Munsif of Kulitalai, in Original Suit No. 396 of 1901.

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defendants Nos. 2, 3 and 4 sued to recover property in the possession of the first defendant in this suit who claimed as the adopted son of one Muthia Mudali, deceased, the divided brother of Soku Mudali. The fifth defendant in this suit was made a co-defendant in the previous suit as he refused to join as plaintiff. The first defendant failed to prove his adoption and the defendants Nos. 2, 3 and 4 obtained, ultimately, a decree for a three-fourths share of the property. In the meanwhile the fifth defendant in Original Suit No. 321 of 1893 hypothecated his share in the estate of Muthia Mudali to the present plaintiff who filed a suit thereon and obtained a decree in execution of which he purchased the property. He brought the present suit to recover the share of the fifth defendant. The first defendant again set up his title as the adopted son of Muthia Mudali; and the substantial question before the Court on appeal was whether he was stopped by the judgment in the previous suit in which he and the predecessor in title of the present plaintiff were co-defendants, from setting up such adoption by section 13, explanation V of the Code of Civil Procedure.

The case came in the first instance before Boddam and Sankaran Nair, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—The question in this case is whether the matter is *res judicata* under section 13, explanation V, Civil Procedure Code.

The previous suit was brought by the second, third and fourth defendants as plaintiffs to recover the property in suit from the first defendant who claimed to retain possession of it as the adopted son of the previous admitted owner. The fifth defendant, a brother of the second, third and fourth defendants (the plaintiffs) was made a defendant in the suit on the ground that he refused to join them in the suit.

The District Court in that suit held that the first defendant had failed to prove his adoption and gave a decree for possession to the plaintiffs for the whole, including the share of the fifth defendant. The High Court on appeal modified the decree by excluding the share of the fifth defendant on the ground that the plaintiffs were not entitled in the suit to recover that share.

The present plaintiff sues as a mortgagee and auction-purchaser of the fifth defendant and the first defendant again sets up his adoption which he failed to prove in the previous suit.

Having regard to the document A which is the mortgage by the fifth defendant to the plaintiff and being of opinion that the parties were at the time of the previous suit undivided with respect to the property in suit though otherwise divided and that the plaintiffs therefore represented in that suit the fifth defendant, if we are to follow *Chandu v. Kunhamed*(1) and *Latchanna v. Saravayya*(2) the matter is *res judicata*. If, on the other hand, we are to follow *Mahabala Bhatta v. Kunhanna Bhatta*(3), the fifth defendant was not represented by the plaintiffs in that suit (defendants Nos. 2 to 4) and the matter is not *res judicata*.

In this conflict of authorities we refer to the Full Bench the question whether the first defendant's contention that he has been adopted is *res judicata* in this suit or not.

The case came on for hearing in due course before the Full Bench constituted as above.

*T. V. Seshagiri Ayyar* for appellant. The question was not *res judicata*. The plaintiff's vendor, the fifth defendant, was *ex parte* in the previous suit. Its conduct was not in his hands, and if the suit was dismissed, he could not have appealed. The High Court in second appeal treated the previous suit as one brought to recover the share of the other brothers only who were plaintiffs in that Court, and modified the decrees of the lower Courts by decreeing to the then plaintiffs their share of the properties sued for and excluded the other brother's (fifth defendant's) share. Explanation V to section 13 applies only when the relief claimed is 'common' to a class of persons; here the relief was not claimed in common; in fact, the plaintiffs in the previous suit, according to the final decision in that case, did not claim any relief on behalf of themselves and the fifth defendant. The fifth defendant was not interested in the result of the suit. Explanation V to section 13 should be confined only to cases where, under section 30 of the Code of Civil Procedure, leave to sue or be sued has been obtained. The cases of *Chandu v. Kunhamed*(1) and *Latchanna v. Saravayya* (2) should not be followed. The case in *Mahabala Bhatta v. Kunhanna Bhatta*(3) should be followed. The cases of *Gopalayyan v. Raghupati Ayyan* alias *Aiyavayyan*(4) and *Nabin Chandra*

(1) I.L.R., 14 Mad., 324.

(2) I.L.R., 18 Mad., 164.

(3) I.L.R., 21 Mad., 373 at p. 383.

(4) 3 M.H.C.R., 217.

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*Mazumdar v. Muktasundari Debi*(1) and also the decision of the Full Bench of the Calcutta High Court in *Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry*(2) are in my favour. If the fifth defendant is not bound by the decision in the previous suit, neither is the first defendant, and both the first and the fifth defendants are entitled to have a fresh adjudication of the question when it arises as between themselves.

*T. R. Ramachandra Ayyar* and *C. V. Anantakrishna Ayyar* for the respondent.—In the former suit, the plaintiffs litigated in respect of a *right* claimed in common for themselves and the fifth defendant therein. As the fifth defendant refused to join as plaintiff in that suit, he was made a defendant. The right claimed in common was brought before the Court for adjudication, and the adjudication made in that suit is binding on all the persons who own the right. The *relief* claimed in the plaint or the relief granted by the Court by its decree has nothing to do with the explanation V to section 13, which speaks only of the '*right*.' The present case comes within the express words of the explanation and the previous decision is consequently *res judicata*. The case in *Chandu v. Kunhamed*(3) and *Latchanna v. Sararajya*(4) should be followed. The point was not decided in *Mahabala Bhatta v. Kunhanna Bhatta*(5). The fifth defendant in the previous suit could have appealed. There was a decree in that suit to which he was party adjudicating on a right which was claimed in common adversely to him. Whether he should have first had his name transferred from the list of defendants to that of plaintiffs or not is only a matter of form. He would have been entitled to appeal if the suit had been dismissed otherwise the doctrine now so well established that there can be *res judicata* even between co-defendants would have no legal basis at all. The cases decided under the earlier Code of 1859 are not authority on the construction of the present section, as there was no provision in the Code of 1859 corresponding to explanation V to section 13. It has been the policy of the legislature to enlarge the scope of *res judicata*.

The then plaintiffs and the fifth defendant represented one body of reversioners and they are all bound by the adjudication

(1) 7 B.L.B., Appx. 38.

(3) I.L.R., 14 Mad., 324.

(5) I.L.R., 21 Mad., 373.

(2) I.L.R., 13 Calc., 352.

(4) I.L.R., 18 Mad., 164.

therein made. Lastly, the adjudication on the question of the adoption was necessary for disposing of the previous suit, and to give the then plaintiff the reliefs claimed by them, and such an adjudication is binding on the co-defendants *inter se*. In the case of *Madhavan v. Keshavay*(1) the decision in a suit brought by one trustee was held to be binding on the other trustees. It is not the defendant's plea that there was any fraud or negligence on the part of the plaintiffs in the former case in the conduct of that suit; that suit was conducted *bona fide* by persons who were themselves interested in the matter,—the right being a common right. The case in *Chandu v. Kunhamed*(2) was followed by this Court in the cases in *Madhavi v. Kedu*(3) and *Latchamma v. Saravayya*(4) in preference to the decisions of the Calcutta High Court. The case in *Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry*(5) was not a case of partition and the Court did not consider explanation V to section 13 of the Code. The decisions of this Court which give effect to the express words of the explanation V to section 13 should be followed. Reference was also made to *Jogendro Deb Roy Kut v. Fumindro Deb Roy Kut*(6).

*T. V. Seshagiri Ayyar* in reply—The decision in *Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry*(5) went much further than the present case, and though Mitter, J., differed on the question of the admissibility of the previous judgment in evidence, all the Judges were agreed that it would not constitute the matter *res judicata*.

The Court expressed the following

OPINION:—The defendants Nos. 2 to 5, sons of one Soku Mudali, are divided brothers and alleged by the plaintiff to be reversioners to the estate of their uncle Muthia Mudali.

The plaintiff claiming as the mortgagee and purchaser of the one-fourth share of the fifth defendant, sues for partition and to recover possession of that share from the first defendant who denies that the fifth defendant is a reversioner and sets up his own title as the adopted son of the deceased Muthia Mudali. The plaintiff contends that the first defendant is estopped from raising this plea by the decisions in Original Suit No. 321 of

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(1) I.L.R., 11 Mad., 191.

(2) I.L.R., 15 Mad., 264.

(3) I.L.R., 13 Calc., 352.

(4) I.L.R., 14 Mad., 324.

(5) I.L.R., 18 Mad., 164.

(6) 14 M.I.A., 307.

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1893, Appeal Suit No. 246 of 1895 and Second Appeal No. 1289 of 1897.

That suit was brought by defendants Nos. 2 to 4 as reversioners to the deceased Muthia Mudali to recover the entire property including the fifth defendant's share from the first defendant who set up the same plea of adoption now put forward by him. The fifth defendant was made a third defendant on account of his refusal to join as plaintiff and allowed the suit to proceed *ex parte*.

The first defendant's alleged adoption was declared invalid and a decree was given by the Appellate Court in favour of the plaintiffs overruling the contention that they were only entitled to their share and not to the share of the present fifth defendant; that Court holding that the fifth defendant could afterwards obtain his share on partition from his brothers.

The High Court, however, reversed the decree so far as the fifth defendant's share was concerned; the suit to recover that share was dismissed and the defendants Nos. 2 to 4 in this suit, the plaintiffs therein, were held entitled only to their three-fourths share.

Conceding that after the decision in the second appeal that suit must now be treated as one brought by the present defendants Nos. 2 to 4 for their share only of the property, it is contended by the plaintiff that the first defendant is estopped by the decision in that suit that his adoption is invalid, from again relying upon it: that the plaintiffs in that suit, represented their brother, the fifth defendant, who was jointly interested with them in the property and they were therefore then litigating in respect of a right claimed by them in common with the fifth defendant—see explanation V to section 13 of the Civil Procedure Code—and reliance is placed upon the decisions in *Chandu v. Kunhomed*(1), approved in *Latchanna v. Saravayya*(2).

It is contended on behalf of the first defendant that the fifth defendant was not in any way interested in that suit, as it must be now treated as having been brought by the then plaintiffs for the recovery of their share only; that they did not sue for such share for themselves and on his behalf; that the right put forward was not a common and indivisible right; that the explanation V

(1) I.L.R., 14 Mad., 324.

(2) I.L.R., 18 Mad., 164.

to section 13 must be confined to cases where leave to sue has been obtained under section 30 of the Civil Procedure Code; and that the case in *Chandu v. Kunhamed*(1) has been disapproved in *Mahabala Bhatta v. Kunhanna Bhatta*(2), and if the fifth defendant is not estopped, then the first defendant cannot be estopped.

The question that is referred to us for decision is whether the first defendant's claim is *res judicata*.

If *Chandu v. Kunhamed*(1) correctly declares the law, then the plaintiff's contention must be upheld.

But we are of opinion that that decision ought not to be followed and proceeds on a wrong view of the scope of explanation V to section 13 of the Civil Procedure Code.

The rule of English Law is thus stated in Vol. 1 of Daniell's 'Chancery Practice,' 7th Edn., page 187, "In order to enable a person to sue on behalf of himself and others who stand in the same relation with him to the subject of the action, it is generally necessary that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent; where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained."

The authorities in support of this statement of the law are cited.

Judged by this test, it is clear there is no estoppel. The fifth defendant under whom the plaintiff claims was not interested in the then plaintiffs, his brothers, obtaining their share of the property: he was certainly not necessarily interested and he would not benefit by a decree in their favour for the relief granted to them.

The only reported cases in India to which our attention has been drawn are to the same effect.

In *Gopalayyan v. Raghupati Ayyan* alias *Aiyavayyan*(3), a member of a Hindu family, brought a suit for his share of the family properties, all the other members being defendants and to ascertain what his share was it became necessary to decide whether the first defendant was adopted into that family. The decision that

(1) I.L.R., 14 Mad., 324.

(2) I.L.R., 21 Mad., 373.

(3) 3 M.H.C.R., 217.

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he was adopted was held in a subsequent suit not to be binding on the plaintiff therein, another member of the family claiming his share of the property. Similarly in *Nabin Chandra Mazumdar v. Muktasundari Debi*(1), the plaintiff in the first suit claimed to recover his share of his father's estate held by the defendant, who alleged title under a will left by the father, making his brother co-defendant. The decision that the will was genuine was held not to be binding on his brother, the co-defendant in the first suit, in a suit that was subsequently brought by him to recover his share of the property.

It is contended before us that whatever was the law before, explanation V to section 13, Civil Procedure Code now makes it clear that a co-owner in the circumstances above stated would be barred and the decision in the first suit brought by the other co-owners would be binding on him.

We are unable to accede to this contention. Under section 26 of the Civil Procedure Code, the persons who are to be joined as plaintiffs are those "in whom the right to any relief claimed is alleged to exist" as stated therein. The plaintiffs in the first suit can be held to represent the plaintiff in the second suit under explanation V to section 13 only if the latter has any "right to any relief" claimed in the first suit. Then alone, using the words in the explanation V, are the plaintiffs in the first suit litigating in respect of a right claimed in common with the plaintiff in the second suit. This is strictly in accordance with the rule of English Law as cited above and is supported by the Full Bench decision in *Sunder Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry*(2).

In that case the plaintiffs sued to recover their share of the rent from defendants. Another co-sharer in the same estate had previously sued for his share making the plaintiffs in the second suit co-defendants. These co-defendants allowed the suit to proceed *ex parte*. With reference to the question of *res judicata* the High Court held "If the former suit had been dismissed, could it have been said that the now plaintiffs were barred? Might they not have said, we had and have to do with our own shares, we neither knew nor cared about other people's shares: why should we have meddled in their suit?" *i.e.*, the plaintiffs in the

(1) 7 B.L.R., Appx. 38.

(2) I.L.R., 13 Calc., 352.



second suit were not interested in the relief prayed for in the first suit and the relief that they claimed in the second suit was not claimed in the first suit.

We agree with this judgment. The fifth defendant in the present suit is not interested in the relief that may be granted to the plaintiffs in the first suit. The conduct of the suit was not in his hands and with reference to the share of the plaintiffs in that suit he could not have been made a co-plaintiff. He gets no advantage therefore from that suit. He cannot enforce any rights of his own under that decree. He cannot get his share and he could not have appealed.

The case in *Chandu v. Kunhamed*(1) is undoubtedly in favour of the respondent. But no reasons are given in that judgment. For the reasons given above, we are unable to hold that that case was rightly decided.

The case in *Madhavan v. Keshavan*(2) has no application. There, a decision dismissing a suit brought on behalf of a devasam by one trustee to recover lands alleged to have been illegally alienated was held to be binding on another trustee who brought a suit for the same relief.

We are therefore of opinion that the fifth defendant and the plaintiff are not barred by any decision in that suit and the first defendant therefore is not barred.

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(1) I.L.R., 14 Mad., 324.

(2) I.L.R., 11 Mad., 191.

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