APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

PANDILLAPALLI SINGA REDDI (DEFENDANT), APPELLANT,

v.

YEDDULA SUBBA REDDI AND TWO OTHERS, (PLAINTIFFS), RESPONDENTS.*

1915. November 5 and 10.

31 M.L.J. 748

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3)—Suit by reversioners to declare an alienation invalid during widow's lifetime, withdrawal of—Subsequent suit after widow's death for possession—Defence, the same as in the first suit—Subsequent suit not barred by Civil Procedure Code, O. XXIII, r. 1 (3).

The next presumptive reversioners of a deceased Hindu instituted a suit against his widow and her alienee for a declaration that an alienation by her was invalid and not binding on them. Pending the suit the widow died and the reversioners withdrew the suit but did not ask for permission to bring a fresh suit. They subsequently brought a suit against the alience for the recovery of possession of properties from him and he set up the very same defences on the merits which he had set up in the first suit:

Held, that the subsequent suit was not barred by the provision of Order XXIII, rule 1 (3), Civil Procedure Code (Act V of 1908). Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit and the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit.

Gopal Chandra Banerjee v. *Purna Chandra Banerjee* (1898) 4 C.W.N., 110, followed.

Achuta Menon v. *Achutan Nair* (1898) I.L.R., 21 Mad., 35, *Machana Vajhala Dikshatulu* v. *Gorugantulu Yaggamma* (1910) M.W.N., 782, and *Sennava Reddiar* v. *Venkatachala Reddiar* (1915) 2 M.L.W., 177, overruled.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Nellore, in Appeal No. 170 of 1913, preferred against the decree of B. KRISHNA RAO, the Temporary Subordinate Judge of Nellore, in Original Suit No. 26 of 1913 (Original Suit No. 40 of 1912 on the file of J. W. HUGHES, the District Judge of Nellore).

The facts of the case appear from SADASIVA AYYAR, J.'s ORDER OF REFERENCE TO THE FULL BENCH.

T. V. Venkatarama Ayyar for the appellant.

S. Varadachariar for the respondents.

* Second Appeal No. 1376 of 1914.

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This Second Appeal and the Memorandum of Objections came on for hearing before SADASIVA AYYAR and NAPIER, JJ., who made the following ORDER OF REFERENCE TO THE FULL BENCH :—

SADASIVA AYYAR, J.—The defendant is the appellant. The plaintiffs are the sons of the daughter of Pera Reddi by his first wife. The defendant is the husband of the deceased daughter of Pera Reddi by his second wife. The wives and the daughters are all dead, the second wife who was the defendant's mother-in-law having died in 1912. Till her death, she was entitled to enjoy the plaint lands as her husband's heir. After her death, the plaintiffs as reversioners are entitled to possession. These are the facts found. The plaintiffs' case succeeded on the merits in the lower Courts as regards most of the properties in dispute. The defendant's learned vakil Mr. T. V. Venkatarama Ayyar did not and could not seriously argue on the merits, the illatom son-in-lawship set up by his client having been found against by the lower Courts.

The learned vakil therefore based his strenuous contentions on a technical question of law. To understand that question, a few further facts have to be stated. The plaintiffs had brought Original Suit No. 46 of 1911 during the lifetime of the defendant's mother-in-law, Venkatammal, against the present defendant (as the first defendant) and against Venkatammal (as the second defendant) for a declaration that the alienation by a settlement deed made by Venkatammal in December 1909 in favour of the present defendant (then first defendant) making several false recitals as to the defendant being an illatom son-in-law and so on, may be declared invalid and not binding on the reversioners after Venkatammal's death. Venkatammal died in 1912 during the pendency of that suit. The present defendant set up the very same false defences on the merits which he has set up in this suit. During the pendency of that suit Venkatammal died. Then the plaintiffs withdrew that suit as, from having been merely contingent reversioners, they became vested reversioners on her death and had become entitled not only to sue for a declaration of the invalidity of Venkatammal's acts after her death but also to sue for possession itself of the lands. They did not ask for permission to bring a fresh suit on the freshly acquired cause of action for fresh reliefs; evidently they thought it would be unnecessary to do so (see Exhibit IX*a*).

The defendant contended at a late stage of the trial of this suit in the first Court that the suit was barred as *res judicata* by the withdrawal of the former suit. It was clear that there could be no *res judicata* in the usual and strict sense of that term as the first suit was not heard and decided and was only withdrawn from the adjudication of the Court. What the defendant meant by the plea of *res judicata* however appears to be that the suit was barred by rule 1 (3) of Order XXIII of the Civil Procedure Code. This statutory bar cannot, in my opinion, be called *res judicata*.

In the lower Courts, *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(1) was relied upon by the defendant. That case was almost but not quite on all fours with the present suit. The plaintiffs there were also reversioners who had first sued for a declaration that the alienations by the widow were invalid, withdrew that suit against some of the defendants and as against some properties in the possession of those defendants without obtaining liberty to bring a fresh suit and then brought a second suit after the death of the widow against those defendants for possession of those properties. The judgment of the learned Judges (MUNRO and SANKARAN NAIR, JJ.) is contained in the following sentence: "Following *Achuta Menon* v. *Achutan Nair*(2), we dismiss the Second Appeal with costs." The Subordinate Judge in his judgment refers to this decision as follows: "There are no reasons given in the judgment which is very brief. It merely follows *Achuta Menon* v. *Actutan Nair*(2). The full facts have not been given. It is very probable that the plaintiff who proceeded to trial in respect of some property in the previous suit was held not entitled to maintain a second suit with reference to the property as to which he withdrew the claim. But in the present case, the plaintiffs did not proceed to trial at all as the widow died. They withdrew the entire suit and instituted this fresh suit for possession of the entire property." I am unable to concur with the learned Subordinate Judge that the fact that the first suit was not withdrawn in its entirety in *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(1) could make any difference in principle, having regard to the language of section 373, corresponding to present Order XXIII,

(1) (1910) M.W.N., 782. (2) (1898) I.L.R., 21 Mad., 35.

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that language making no difference in the result between the withdrawal of a portion or the withdrawal of the whole of a suit as regards the effect of such withdrawal on the suit or the portion of the suit as the case may be. Then the learned Subordinate Judge says in paragraph 52 of his judgment that in *Achuta Menon* v. *Achutan Nair*(1), the first and the second suits were both suits for the relief of ejectment and that the titles set up in the two suits were also substantially the same and that the general observations in *Achuta Menon* v. *Achutan Nair*(1), namely, that where the first suit was withdrawn without liberty to bring a fresh suit, the plaintiff cannot contest in the second suit the allegations which constituted the defence or part of the defence to the claim made in the first suit, must be confined to cases where the causes of action for the two suits and the reliefs claimed in the two suits are substantially the same.

The learned District Judge in paragraph 20 of his judgment says: "The only case on which the appellant can rely is *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(2) but I find it difficult to apply this case in the absence of a full report of the facts." I have perused the printed papers in *Pullayya Dikshatulu* v. *Yagnamma*(3) and I find the facts are not so different in material particulars as to affect the applicability to this case of what I must hold to have been the principle of the decision in *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(2). Further in *Sennava Reddiar* v. *Venkatachala Reddiar*(4) AYLING and TYABJI, JJ., held themselves bound by the decisions in *Achuta Menon* v. *Achutan Nair*(1) and *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(2) and dismissed an absolutely similar suit to the present one as barred by Order XXIII, rule 1 (3), of the Civil Procedure Code. In that case also, the widow died during the pendency of the first suit. The learned Judges held that the slight difference in language between section 373 and Order XXIII, rule 1 (3) (the word "matter" being substituted by the words "subject-matter"), did not make any difference. TYABJI, J., says: "In the face of the above" two "decisions," "there is no room for any further discussion of the law." I am free to confess that I feel grave doubts as regards

(1) (1898) I.L.R., 21 Mad., 35.
(2) (1910) M.W.N., 782.
(3) Second Appeal No. 389 of 1908.
(4) (1915) 2 M.L.W., 177.

the decisions in *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(1) and *Sennava Reddiar* v. *Venkatachala Reddiar*(2). So far as *Achuta Menon* v. *Achutan Nair*(3) is concerned, my learned brother and myself followed it recently in *Damodaran* v. *Theyyanakan*(4). But in that case, the cause of action for and the relief claimed in the first suit were found for the purposes of that decision to have been substantially identical with the cause of action and the relief claimed in the second suit and we held that the facts mentioned in the defence in the first suit cannot be controverted in the second suit. We did not, however, dismiss the second suit but gave relief to the plaintiff on the basis of the truth of the facts pleaded by the contesting defendants in the first suit. Mr. Varada Achariyar wished to attack *Achuta Menon* v. *Achutan Nair*(3) on the ground that on the facts of that case the second suit could not be held to have been on substantially the same cause of action as the first suit and hence that decision itself was wrong. I do not think when dealing with a question of law such as this we could go behind the statement of the learned Judges as to the nature of the relationship between the causes of action in the two respective suits. At page 39 the learned Judges say: "In our opinion it cannot properly be said that there is no integral connection whatever between the plaintiff's allegations in the two suits, that there is a complete difference between the cause of action alleged before and that alleged now, and that the transaction of 1893 between the plaintiff and the present Zamorin, which is the only distinguishing circumstance relied on, imposed on the defendants a duty wholly or to any extent different from that to which they were subject before that transaction took place." Then, no doubt, they go on to say "suppose, however, that the plaintiff's cause of action in the previous suit was different from that in the present suit," and to express the opinion that even in that case the plaintiff would be barred from controverting the defence allegations in the first suit.

While I am prepared to follow the ruling in *Achuta Menon* v. *Achutan Nair*(3) where the causes of action for the two suits are substantially the same, I regret that I cannot follow the *obiter dictum* that even if the causes of action are substantially

(1) (1910) M.W.N., 782.
(2) (1915) 2 M.L.W., 177.
(3) (1898) I.L.R., 21 Mad., 35.
(4) Second Appeal No. 570 of 1914.

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different, the facts stated in the defence in the first withdrawn suit cannot be controverted in the second suit. If the causes of action are the same and if the reliefs *claimable* (though not claimed) are the same, then also Order XXIII will apply, read with Order II, rule 2. Where the causes of action are substantially different and *afortiori*, where not only the causes of action are different but the reliefs claimed are different and still more, where not only the causes of action are substantially different, but the reliefs claimed are bound to be different, I do not think that the defence pleas in the first suit are made incontrovertible in the second suit by the provisions of Order XXIII. Nor do I think that the difference in language by the substitution of the word "subject-matter" [(which is the word used in the Order XXIII, rule 1(3)], for the word "matter" (which was the word used in paragraph 2 of section 373) can be held to make any difference in the scope of the two provisions. While paragraph 1 of section 373 used the word "subject-matter" paragraph 2 used the word "matter" and this was corrected in the new Code for the sake of uniformity. I might further respectfully point out that no authority is quoted for giving such a very wide interpretation to the word "subject-matter" or "matter" in *Achuta Menon* v. *Achutan Nair*(1), that is, so as to include the defence allegations in the first suit even where the second suit is brought on a different cause of action. Let me take an extreme case to show the length to which we would have to go if the *obiter dictum* in *Achuta Menon* v. *Achutan Nair*(1) is followed. Suppose *A* brings his first suit against *B*, a trespasser who trespassed on the plaint lands one year before suit, *A* claiming title as purchaser from *C* whom he treated as the heir of *D*, the admitted former owner. *B* sets up a false claim of ownership in himself as heir to *D* (the admitted owner who died two years before suit) in preference to the plaintiff's vendor *C*. During the course of the suit, *A* finds that neither *C* nor *B* is the real owner but *E* is the owner as the real heir of *D*. He therefore withdraws his first suit against *B* without permission to bring a fresh suit. He then gets a conveyance from *E* and within three years of the death of the admitted owner *D*, brings a second suit against *B* basing it on the title obtained by the purchase from

(1) (1898) I.L.R., 21 Mad., 35.

F. Can it be argued that his second suit based on the purchase from *E* the real owner is barred by the incontrovertibility of the false defence raised by *B* in the first suit, though the plaintiff honestly and properly withdrew his first suit which he brought through his mistaken notion that *C* was the heir of *D* and which suit was bound to fail?

I am further clear that the suit for declaration brought by a contingent reversioner who has really no title in the eye of the law [see section 6, clause (*a*) of the Transfer of Property Act and section 60, proviso clause (*m*) of the Civil Procedure Code] and who is given a special cause of action by the current of decisions in the Privy Council to bring a suit to declare the widow's alienation invalid as against the reversioners and whose suit as recently decided by the Privy Council in *Venkatanarayana Pillai* v. *Subbammal*(1) is brought on behalf of all the possible contingent reversioners, is brought by him in a quite different character from a suit brought by the same person in whom the inheritance became fully vested on the death of the widow to recover possession of the property from the widow's alienee. The fact of the widow's death is a most important fact which thoroughly changes the nature of the cause of action and which vests the cause of action in a particular defined person and not in the whole body of possible contingent reversioners. Further while in the contingent reversioner's suit he cannot claim the relief of possession but only the relief of declaration (and reliefs appurtenant to that declaratory relief), in the second suit he cannot claim the relief of declaration as a substantial relief or as the only relief but can and ought to claim the relief of possession; see *Syed Siliman Sahib* v. *Hussain Sahib*(2) which is a still stronger case in favour of the plaintiff because it was held that a suit for declaration by a person out of possession was on a different cause of action from that on which a second suit for possession on the same title was based. Again in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee*(3), BANERJEE, J., says: "The mere fact of two suits being in respect of the same property would not be sufficient to make the latter suit one for the same matter as the former, *when the state of facts leading to the*

(1) (1915) I.L.R., 38 Mad., 406 (P.C.). (2) (1913) 25 M.L.J., 125.
(3) (1898) 4 C.W.N., 110 at pp. 112 and 113.

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two suits and the reliefs claimed under them are different." In *Kamini Kant Roy* v. *Ram Nath Chuckerbutty*(1), BANERJEE and RAMPINI, JJ., held that where the causes of action were different, the fact that the defence was the same in both suits and the first suit was withdrawn without liberty to bring a fresh suit did not prevent the plaintiff from controverting in the second suit the defence made in the first suit and repeated in the second.

In section 11 of the Civil Procedure Code which treats of bar by *res judicata* the word used in the section in explanations 3 and 4 is "matter." In the statutory bar prescribed in Order II, rule 2, the expressions used are "subjects in dispute," "cause of action" and "claim." In the statutory bar enacted in Order XXIII the word is "subject-matter." In *Kaveri Ammal* v. *Sastri Ramier*(2) the word "object-matters" is used (see line 2) when considering the question of *res judicata*. In *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3), Sir BHASHYAM AYYANGAR considers fully the provisions of the old Civil Procedure Code corresponding to the provision of section 11 and Order II of the new Code. At page 763 he says: "The first contention is mainly based on the argument that the phrase 'the subjects in disputes' occurring in section 42 connotes the corpus or object-matter of the claim and that, therefore, all possible claims to the same should necessarily be offered for decision in the suit. In our opinion the expression 'the subject in dispute' signifies *the jural relation between the parties to the suit, for the determination of which the suit is brought.* In other words, the object of section 42 is to require the plaintiff to bring forward his whole case as to the *matter of litigation on the question of right involved in the suit* and not to require him to unite all the causes of action which he may have against the defendant in respect of the corpus or object-matter of the suit." Then at page 766 he says: "It is clear that the expression 'subjects in dispute' means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other and demands the judgment of the Court upon." At page 768, he refers to Mr. Justice HOLLOWAY'S decision where the expressions "matter of litigation," "question of right," "particular kind of claim" occur.

(1) (1894) I.L.R., 21 Calc., 265. (2) (1903) I.L.R., 26 Mad., 104 at p. 109.
(3) (1903) I.L.R., 26 Mad., 760.

It may be that there are subtle and refined distinctions between the meanings of the different expressions "subject-matter," "corpus," "object-matter," "cause of action," "matter," "transaction" [a word used in some places in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1)], "ground of claim" and so on. I do not mean to venture upon a discussion of such differences. In *Achuta Menon* v. *Achutan Nair*(2), the word "matter" in section 373 was held to include the question which is raised in the allegations of the defendant. The expression "fresh suit for the same matter" was considered as meaning a fresh suit which involves the truth of the allegations of the defendant forming part of the matter to be decided in the former suit. It may therefore be that the word "matter" has a larger meaning than "cause of action." But can the "matter" in the second suit be held to be the same when the cause of action is substantially different though the defence is the same? In respect of the bar by *res judicata*, it has now been settled by the decisions in *Krishna Behari Roy* v. *Brojeswari Chowdranee*(3), *Ummatha* v. *Cheria Kunhamed*(4), *Alluni* v. *Kunjusha*(5) and *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1) that, where the causes of action are different, even a dismissal of the first suit by the Court after contest on the merits is no bar to the maintainability of a second suit on a substantially different cause of action, even though the defences may be the same in the two suits. Is a plaintiff who, honestly in order to save the time of and trouble to the Court, withdraws the first suit instead of allowing it to be dismissed on the unsustainability of the rights set up by him, to be in a worse position by his said honest withdrawal than if he had delayed the disposal of that suit and obliged the Court to give its opinion on the merits of his first cause of action?

I would therefore refer to the opinion of the Full Bench the following question:—

Whether the rule laid down in *Achuta Menon* v. *Achutan Nair*(2) (that a plaintiff who has withdrawn a former suit without permission to bring a second suit is prevented from agitating in the second suit the truth of the allegations which constitute the defence in the first suit) applies in the present case where the

(1) (1903) I.L.R., 26 Mad., 760.
(2) (1898) I.L.R., 21 Mad., 35.
(3) (1875) 1 Calc., 144 (P.C.)
(4) (1882) I.L.R., 4 Mad., 308
(5) (1884) I.L.R., 7 Mad., 264.

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cause of action and the relief claimed in the second suit are substantially different from those in the first suit.

NAPIER, J.

NAPIER, J.—I entirely agree. It seems to me that there must be a distinction in a case like this where the first suit would not give the plaintiff all that he became entitled to when the death of the widow gave him a new cause of action; unless he got leave to amend, he would necessarily have to bring a second action founded on the declaration given in the first, and it is more reasonable that he should withdraw the first suit and bring a consolidated suit for possession.

The case came before the Full Bench.

T. V. Venkatarama Ayyar for the appellants.

S. Varadachariar for the respondents.

The following OPINION of the Court was delivered by

WALLIS, C.J., AND ABDUR RAHIM AND SRINIVASA AYYANGAR, JJ.

WALLIS, C.J.—We agree with the conclusions of SADASIVA AYYAR, J., in the ORDER OF REFERENCE.

The question is whether the second suit can be regarded as brought in respect of the same subject-matter as the first suit within the meaning of Order XXIII, rule 1 (3) of the Civil Procedure Code. The terms "subject-matter" and "the same matter" which occurred in the corresponding section 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this character. Without attempting an exhaustive definition of all that may be included in the term "subject-matter" we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. This was expressly decided in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee*(1) with which we agree. It follows that the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit. We think that the decision in *Achuta Menon* v. *Achutan Nair*(2) and the decisions which followed it, viz., *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma*(3) and *Sennava Reddiar* v. *Venkatachala Reddiar*(4) must be overruled.

C.M.N.

(1) (1898) 4 C.W.N., 110.
(2) (1898) I.L.R., 21 Mad., 35.
(3) (1910) M.W.N., 782.
(4) (1915) 2 M.L.W., 177.