APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

1927, March 18.

MADDIRALA JAGANNADHAM AND ANOTHER, (FIRST AND SECOND DEFENDANTS), APPELLANTS,

v.

MADDIRALA VENKATASUBBA RAO AND OTHERS (PLAINTIFF AND DEFENDANTS 3 AND 29), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 11—Res judicata—*Suit by reversioners—Plea of* jus tertii *in his father set up by defendant—Plea negatived and decree passed for plaintiffs—Subsequent suit by defendant, based on title vested in his father as the nearest reversioner—Question covered by plea of* jus tertii—*Decision in previous suit, whether* res judicata—*Pedigree, proof of—Name of common ancestor, not known—Whether proof of relationship, necessarily fails.*

In a suit by certain persons as reversioners to recover an estate, the defendant set up a plea of *jus tertii* in his father as the nearest reversioner who was alive at the time of the suit but was not joined in the suit; the plea was negatived and decree passed for the plaintiffs. Subsequently, the then defendant, after his father's death, instituted the present suit to recover the estate from the then plaintiffs, tracing his title through his father in whom he alleged the estate had vested in his lifetime as the nearest reversioner; on the latter pleading the bar of *res judicata*,

Held, that the decision in the previous suit on the reversionary right of the plaintiff's father raised by the plea of *jus tertii*, was not *res judicata* on the same question in the present suit, based on the title of the father as the nearest reversioner.

In proving a pedigree, although a person claiming as heir must show all the stages of relationship from a common ancestor, it is not the law that, if the name of the common ancestor is not known, it must be held that the relationship is not proved.

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* Appeal No. 375 of 1923.

JAGAN-NADHAM v. VENKATA-SUBBA RAO.

Kedarnauth Doss v. *Protab Chunder Doss*, (1881) I.L.R., 6 Calc., 626, explained. *Roe. d. Thorne* v. *Lord*, (1776) 2 Bl.W., 1099; 96 E.R., 649, referred to.

APPEAL against the decree of K. SUNDARAM CHETTI, the Subordinate Judge of Guntūr, in Original Suit No. 90 of 1921.

The material facts appear from the judgment.

B. Somayya for appellants.

Ch. Raghava Rao for respondent.

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—This appeal arises out of a suit by a reversioner to recover certain properties of a deceased person named Punnayya. Defendants 1 and 2 claim to be nearer heirs than the plaintiff. The plaintiff is the son of Pakeerayya. His present suit is based on the ground that his father who survived the deceased was a nearer heir than the defendants and after the property vested in Pakeerayya he succeeded to his right. The learned Subordinate Judge found in favour of the plaintiff and gave a decree. The defendants appeal.

The first question argued in appeal is the question of *res judicata*. Immediately after the death of Pakeerayya there was a suit by the present defendants to recover the property in which the defendant was the present plaintiff. But the father of the present plaintiff was not a party to the suit. In that suit the defendant, that is, the present plaintiff, pleaded his own title and did not rely upon any title of Pakeerayya because he could not, as Pakeerayya was then living. He merely put forward the title of Pakeerayya as *jus tertii*. As the plea was found against him, the plaintiffs in that case were given a decree. On appeal an attempt to file some documents and prove the title of Pakeerayya was disallowed. So far as the former litigation is concerned,

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all we have is that the defendant in the case raised a plea of *jus tertii*. It cannot be said for the purpose of section 11 that the decision on a plea of *jus tertii* is a decision between the parties litigating under the same title when the *jus tertii* is put forward and actually relied on in a later case by the third person. All that can be said is that, in the former suit, it was raised as a defence. It cannot be said that the defendant was actually relying upon that title or litigating under it. Now the present plaintiff who claims as the heir of Pakeerayya litigates under it. Mr. Somayya who appears for the appellants concedes that the judgment in the former suit does not bind Pakeerayya himself, or his assignees, or his heirs. It is merely an accident in this case that the heir of Pakeerayya happens to be the very person who put forward the plea of *jus tertii*. That is only an accidental circumstance. It might happen to be a different person. It is therefore clear that there is no *res judicata* by reason of the judgment in the former litigation.

The second point argued is the question on the merits, namely, as to who is the nearer heir.

[His Lordship then dealt with the evidence and proceeded as follows :—]

The result is that the plaintiff's case is made out and the decree of the lower Court is right.

One question of law was raised by the learned vakil for the appellants. He refers to *Kedarnauth Doss* v. *Protab Chunder Doss*(1) and says that the name of the common ancestor is not proved. On the face of Exhibit A it is true that we do not know the name of the common ancestor and we start with three cousins as ancestors. It is said that without the name of the

(1) (1881) I.L.R., 6 Calc., 626.

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common ancestor a pedigree cannot be proved. In *Kedarnauth Doss* v. *Protab Chunder Doss*(1) Sir RICHARD GARTH, C.J., says:—

"I believe that the rule of evidence there in cases like the present is correctly laid down in the last edition of Roscoe's *Nisi Prius* Evidence, page 1010, that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title *through the common ancestor in all its stages*; and one most important stage is of course the common ancestor himself."

And the other Judge, PONTIFEX, J., does not say anything on this matter. He simply says,

"The plaint ought to have stated the descent from a common ancestor, and the evidence ought to have supported such statement."

But even the Chief Justice's judgment merely says that the allegation in the evidence of a person claiming as heir must show all the stages of relationship from the common ancestor. To this proposition nobody objects. When a person claims to be a "gnati" of the fourth or fifth degree, it is not sufficient if all that appears in the case is that he may be a cousin of the tenth or twelfth degree. What he claims must be alleged and proved. It does not mean that if the name of the common ancestor is not known it must be held that the relationship is not proved. It does not mean that if two people have been proved to be brothers, their descendants are not related to one another merely because the name of the father of the two brothers is not known. No doubt, if a witness comes and swears that he knows the names of the two brothers, but he is not able to give the name of their father, it may be a circumstance to be taken into consideration in deciding whether the witness should be believed or not. The fact that a witness is unable to give the name of the common ancestor may be a cogent reason why he should

(1) (1881) I.L.R., 6 Calc., 626.

be disbelieved. But if we are otherwise clear that two people are grandsons of brothers, the mere fact that the name of the common ancestor is not known cannot be made a reason for holding that the relationship is not proved at all. There can be no such legal proposition. We do not think that the learned Chief Justice meant to say any such thing or lay down any such proposition. Anyhow the authority relied on by the Chief Justice does not support this proposition. In the 18th edition of Roscoe's *Nisi Prius* Evidence, published in 1907, the passage is at page 1038 and runs thus:

> "If the plaintiff claims as collateral heir he must prove the descent of himself and the person last seized from a common ancestor; or at least from two brothers or sisters; *Roe. d. Thorne* v. *Lord*(1)."

This passage merely shows that there must be at least two brothers or sisters. Looking at the case itself which is reported in *Roe d. Thorne* v. *Lord*(1) all that we have got is this:

> "The Court took time to consider till this present term, when not being able to agree in opinion concerning the necessity that a person claiming to be heir shall state in evidence a pedigree either proving the deceased and the claimant to be descended from some common ancestor, or at least from two brothers or sisters (which was allowed to be an immediate descent) or whether vague evidence of heirship, without such deduction, is proper to be left to a jury, etc."

The contrast is between definite evidence of common ancestry or brothers' ancestry as against vague evidence of common ancestry. Of course vague evidence will not prove definite pedigree or descent. Definite descent from brothers is certainly common ancestry. There can be no legal proposition that because the name of the common ancestor is not known, the relationship cannot beheld to be proved. *Kedarnauth Doss* v. *Protab Chunder*

(1) (1776) 2 Bl. W., 1099; s.c., 96 E.R., 649.

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Doss(1) cannot be regarded as an authority for such a proposition, as is sometimes supposed. In this case there is a clear statement by the defendants' ancestors that Madiraju, Narayanappa, and Lingaraju were grandsons of brothers. At that time there was no motive for making an inaccurate statement and the pedigree was not in dispute.

Acting on Exhibit A-1, I accept the conclusion of the learned Subordinate Judge and dismiss this appeal with costs.

The memorandum of objections also fails and is dismissed with costs.

KUMARASWAMI SASTRI, J.—I entirely agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

1927, February 25.

SRI RAJAH SATRUCHERLA SIVASKANDA RAJU BAHADUR GARU, APPELLANT,

v.

SRI SRI SRI RAMACHANDRA DEO MAHARAJULAM GARU, RAJA OF JEYPORE AND OTHERS, RESPONDENTS.*

Execution—Ss. 21, 37, 38, 150, *Civil Procedure Code* (*V of* 1908)—*Preliminary mortgage decree—Transfer of territorial jurisdiction thereafter to another Court—Passing of final decree by the first Court without objection—Right of the first Court to order sale of mortgage properties.*

After the passing of a preliminary mortgage decree, the Court that passed it ceased to have territorial jurisdiction over any of the mortgaged properties. After a final decree was passed by the same Court without any objection by the mortgagor, the mortgagee applied to that Court for sale.

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(1) (1881) I.L.R., 6 Calc., 626.

*L.P.A. No. 37 of 1927.