APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Pakenham Walsh.

KUMARAPPA CHETTIAR AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

1931, September 29.

v.

ADAIKKALAM CHETTY AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 11—Res judicata—*Finding declaring joint title of parties to suit and third parties*—*If operates as* res judicata *between parties*—*Adverse finding against a party who could not appeal*—*If operates as* res judicata—*Hindu Law*—*Partition*—*Complete or partial*—*Presumption.*

There were five brothers A., V., S., R., and another. A. filed a suit in 1906 against S. and Z. (a stranger to the family) claiming that a certain sum of money lent on mortgage to Z. by him in 1885 was his exclusive property. In that suit S. who did not represent V. and R. stated that the sum of money belonged to himself and V. and R., and that A. had no right to the same; Z. contended that the suit was bad for non-joinder of proper parties since the sum of money belonged to all the five brothers jointly. Nobody raised the point that there was a partition in 1887 among the brothers. The Court held that, on the date of the transaction of 1885, A. lived separately from his brothers, and that he took the mortgage of 1885 in his name with funds in which his brothers were interested and in which they had a share, and that there was no ground for supposing that when A. lent the money he was acting as the managing member of the joint family or was representing any interest but his own and as such the suit was not bad for non-joinder of proper parties. A decree was passed in A.'s favour for the amount claimed. In a later suit by V.'s widow against the other members of the family it was held that in 1887 there was a partition among the five brothers. S. filed a suit in 1924

* Appeals Nos. 173 of 1929 and 376 of 1924.

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against A. and several others, claiming a fifth share of the sum of money that was the subject-matter of the suit of 1906, basing his claim on the findings in that suit and also alleging that the sum was not disposed of by the partition of 1887.

Held (1) that where a partition has taken place the presumption is that it was a complete partition and the burden lies upon him who alleges that a certain property was excluded from the partition to show that it was a partial partition;

(2) that the finding in the suit of 1906 cannot operate as *res judicata* between A. and S. because the suit, in spite of the finding, was decided in A.'s favour and as a result he had no right to appeal for the purpose of challenging the finding;

and (3) that the finding in that suit cannot operate as *res judicata* between A. on the one hand and V. and R. on the other since the latter were not parties to that suit and it cannot operate as *res judicata* between A. and S. by the mere fact that they were parties to that suit, since the joint title of all the five brothers (including V. and R.) to that sum was found in that suit and not the exclusive title of S., V., and R.

APPEALS against the decrees of the District Court of West Tanjore in Original Suits Nos. 19 of 1924 and 4 of 1923.

K. S. Sankara Ayyar and *K. R. R. Sastri* for appellants.

B. Sitarama Rao and *S. R. Muthuswami Ayyar* for first respondent.

The other respondents were unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

NKATA-A RAO J.

VENKATASUBBA RAO J.—These appeals relate to the ownership of a certain sum of money. To dispose of them, it is unnecessary to refer to more than a few facts. There were five brothers: (1) Adaikkalam Chetty, (2) Veerappa Chetty, (3) Subban Chetty, (4) Rengan Chetty and (5) Vaidyalinga Chetty. In 1885 Adaikkalam lent on the mortgage of certain properties a sum of Rs. 13,000 to a person whom we shall call the Zamindar. The deed

of mortgage was taken in the name of Adaikkalam. In 1888 the last three brothers (Subban, Rengan and Vaidyalinga) lent to the same person Rs. 4,000 on a second mortgage of those properties. The deed was taken jointly in the names of the three brothers mentioned above. That deed provides for the payment by them of Rs. 13,000 due to the first mortgagee, Adaikkalam. He, however, was not paid and the mortgage in his favour remained in force. On the 28th of December 1905 Vaidyalinga assigned by Exhibit II his one-third share in Rs. 4,000 in favour of Adaikkalam. On the 6th of January 1906 Rengan similarly assigned his share in favour of the same person, Exhibit III. On the 10th of October 1906 Adaikkalam filed Original Suit No. 49 of 1906 to enforce his rights under the two mortgages referred to above. In that suit the Zamindar was made the first defendant and Subban, Adaikkalam's brother, the second. As subsequent mortgagees, certain others were impleaded as defendants 3 to 6. Adaikkalam as plaintiff claimed not only Rs. 13,000 but also two-third of Rs. 4,000 basing his right thereto on the assignments executed in his favour by Rengan and Vaidyalinga. In the plaint in that suit he alleged that Subban was entitled to a third of Rs. 4,000, that he was therefore asked to join with him as plaintiff, and that, on his failing to do so, he was impleaded as a defendant. He prayed that a decree might be passed both in favour of himself and Subban for the respective amounts due to them. In effect, Adaikkalam asked for no relief against Subban but prayed, on the contrary, that a decree might be passed both in his and Subban's favour. The suit was resisted both by the Zamindar and Subban. To the defence raised by Subban we shall advert presently. The Zamindar pleaded, *inter alia*, that the amount of the first mortgage belonged not solely to

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Adaikkalam but to the joint family of which he was a member and that the suit was bad for the non-joinder of the other coparceners. An issue was framed as to whether Adaikkalam was solely entitled to the sum of Rs. 13,000, and the trial Judge, coming to the conclusion that it did not, dismissed the suit. From his decree an appeal was taken to the High Court, Appeal No. 189 of 1909. What the effect is of the decision then given by the High Court is one of the matters we have to decide. For the present it is sufficient to state that the High Court allowed the appeal of Adaikkalam and passed a decree in his favour, holding nevertheless that the Rs. 13,000 belonged not to him solely but to the joint family. In the present appeals, the question to decide is, is Subban entitled to a fifth of this sum of Rs. 13,000? There were two suits filed in the lower Court and each of them raised the question, is Subban entitled to a fifth of the amount or is Adaikkalam the sole owner? For the sake of brevity Subban may be treated as the plaintiff and Adaikkalam as the defendant. The lower Court has disallowed the claim of Subban.

On behalf of Subban, his learned Counsel, Mr. K. S. Sankara Ayyar, has strongly urged that the decision of the High Court in Original Suit No. 49 of 1906 operates as *res judicata* in his favour. Before examining that contention, we shall deal with the merits of the case. The question of fact that arises is, on the date of the mortgage suit, to whom did the Rs. 13,000 belong, to Adaikkalam solely or to the five brothers jointly?

In Suit No. 49 of 1906, that question, as we have said, was raised at the instance of the Zamindar. Adaikkalam's case then was, that there was a partition of the joint family property in 1882 and that the sum lent in 1885 was his separate property. Subban, after

pleading that the family in 1885 was joint, went on to allege that by some arrangement the last three brothers (Subban, Rengan and Vaidyalinga) became exclusively entitled to the mortgage amount, namely, Rs. 13,000. It is important to bear in mind that each of the three contending parties gave a different version—Adaikkalam stating that the amount was his separate property, the Zamindar that it belonged to the joint family, and Subban that it belonged solely to the last three brothers. We may usefully quote a passage or two from Subban's written statement :—

"Then, I, Rengan Chetty and Vythi Chetty, in all, three persons, arranged that the said bond for Rs. 13,000 should be allotted to our share, at the time of future division of our family properties, that the plaintiff should have no right whatever to the said bond of Rs. 13,000, that he should not claim any right to it, that we three alone should jointly pay Rs. 4,000 to the first defendant, and that in respect of the othi deed for Rs. 17,000 to be obtained from the first defendant in our favour after such payment, plaintiff should have no right whatever. We paid Rs. 4,000 to 1st defendant and obtained a othi deed for Rs. 17,000 on 21st June 1888."

"Thereupon the plaintiff and the deceased Veerappa Chettiar lived together, and myself and the other two brothers, namely, Rengan Chettiar and Vythi Chettiar, together. Subsequent to our othi deed for Rs. 17,000 the plaintiff had no sort of enjoyment in the villages in dispute."

"From the date of the said othi deed, we three have been enjoying the suit villages adversely to the plaintiff. From the date of our othi deed for Rs. 17,000, the plaintiff had no sort of claim or enjoyment whatever in the suit villages."

In effect, Subban denied Adaikkalam's right to any part of the sum of Rs. 17,000 and distinctly prayed that the suit should be dismissed with costs. The significance of this, will shortly appear when we consider the point of *res judicata*. But, to proceed, the trial Court, as we have said, dismissed that suit holding that

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Adaikkalam and his brothers were undivided and that the money belonged jointly to all of them. The High Court, while confirming the finding that the amount was their joint property, set aside the decree dismissing the suit. On what grounds, then, did the High Court come to that decision? It held (i) that Adaikkalam was on the date of the transaction of 1885 living separately but that he took the mortgage in his own name with funds in which his brothers were interested and had a share and (ii) that there was no ground for supposing that when Adaikkalam lent the money he was acting as the managing member of an undivided family or was representing any interests but his own; see *Adaikkalam Chetti* v. *Subban Chetty*(1). On these findings, the learned Judges held as a question of law that the mortgagee could maintain the suit in his own name. They then go on to observe that, even assuming that Adaikkalam was on the date of the mortgage the managing member of an undivided family, he could still sue on the contract entered into by him in his own name without impleading the other members of his family; (see page 626). Acting on this view, the High Court decreed Adaikkalam's suit. But since then an important event which alters the aspect of the case has occurred. A suit commenced in 1919 was, after these appeals had been filed, finally decided by the High Court in 1930. That was a suit filed by Vaidyalinga's widow against the other members of his family. In that suit, the question as to the status of the family was directly raised: Was there a partition and, if so, when? The High Court held (i) that in 1887 there was a partition among the five brothers and (ii) that the last three brothers who reunited became divided in 1905.

(1) (1914) 27 M.L.J. 621, 624.

It is common ground that by this finding as to the status of their family, the parties are bound. When the High Court decided the mortgage suit of 1906, none of the three contestants put forward the partition of 1887. When we approach the evidence in the case, this fact must be borne in mind. Having regard to the then contentions, all that the High Court had to decide was whether Adaikkalam became divided in 1882, that is, previous to the mortgage. If that was found in the negative, it necessarily followed that the money was the property of the joint family. But the recent decision has declared that there was a partition in 1887, that is, subsequent to the mortgage. If so, whose property did this mortgage become by reason of that partition? That is the question we have now to decide—very different from what the High Court had then to determine. Having this in view, let us proceed to examine the evidence. When the second mortgage (the one of 1888) was executed, Subban and his two brothers agreed to redeem the first mortgage in favour of Adaikkalam. The mortgage deed contains a stipulation that they were to pay him Rs. 13,000. If Subban's present case is true, he and his two brothers were entitled to three-fifths of that amount. Why then did they agree to pay the entire Rs. 13,000 to Adaikkalam? To this admission, made as it were close after the partition of 1887, great weight must be given; for, it is Subban's case that the mortgage was at that partition, kept joint. Then, again, in the 1905 partition Subban and his two younger brothers treated this mortgage as the joint property belonging to them exclusively. How is this conduct of Subban consistent with the mortgage having been set apart as joint property in 1887? We have already said that Rengan and Vaidyalinga assigned their interests in the Rs. 4,000 to Adaikkalam. This

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happened shortly before the suit of 1906. In the assignment deeds these two brothers distinctly recognize Adaikkalam's sole right to the sum of Rs. 13,000. Then came the mortgage suit of 1906. Subban did not then set up as we have pointed out, that the Rs. 13,000, was the joint property of the five brothers. He alleged, on the contrary, that it was the sole property of himself and his two younger brothers. What value then can be attached to his present case that he is entitled to a fifth of the sum on the ground that it belongs to the five brothers jointly ? His plaint is as vague as it can be on the point. The only person examined in the case is Adaikkalam, who, of course, denies Subban's claim. The depositions in Original Suit No. 49 of 1906 of Subban, Rengan and Vaidyalinga have been treated as evidence, those persons having since died. There was, they deposed, a partition in 1887 ; but, according to them, it was an incomplete one. Rengan stated that in property worth about Rs. 20,000 Adaikkalam refused to give the others a share and that the Rs. 13,000 in question was a part of that Rs. 20,000. Referring to the undertaking by him, Subban, and Vaidyalinga to redeem the first mortgage, this is what he says : "It is only with the idea of paying Rs. 13,000 to the plaintiff (Adaikkalam) that we obtained the document for Rs. 17,000." There is nothing worth noting in Vaidyalinga's deposition beyond the fact that he spoke to the partition of 1887 and admitted that the sum of Rs. 13,000 belonged to Adaikkalam. Subban was concerned with making out that the defence he set up in his written statement was true, namely, that he and his two brothers became the exclusive owners of Rs. 13,000. As regards the partition of 1887, he stated that it was an incomplete one, as Adaikkalam did not include "Athani village, some jewels, and the deed for Rs. 13,000." He

then went on to suggest that, at the time of the second mortgage, Adaikkalam gave up his right to the Rs. 13,000 saying "that he (Adaikkalam) would adjust the sum of Rs. 13,000 from the unpartitioned jewels and other properties." What then emerges from these facts? That Adaikkalam asserted at the partition of 1887 his sole right to this sum, that it accordingly was not made the subject of division, that in 1888, shortly after the partition, all the three brothers recognised his right, that two of them (Rengan and Vaidyalinga) in 1905 and 1906 admitted his title in the assignments and in the suit that followed gave evidence in support of it, and (this is significant) that they have consistently adhered to this position and have never since claimed any right in the suit amount.

Moreover, the burden was upon Subban to prove that the partition was not a complete one. When it is admitted or proved that a partition has already taken place, the presumption is that it has been a complete partition, and it lies upon a person alleging that family property in the exclusive possession of one of the members of the family after such partition is liable to be partitioned to make good his allegation by proof; *Narayan Babaji* v. *Nana Manohar*(1).

There is no presumption that any property was excluded at a partition; on the contrary, the burden lies upon him who alleges exclusion, to establish his assertion; *Kailas* v. *Bijay*(2). Both on the evidence and the probabilities we must find that Subban's claim to a fifth of this sum is unfounded. The finding to the contrary of the lower Court in Civil Suit No. 199 of 1924 (one of the two suits out of which the appeals arise), given as it was before the recent adjudication by the High Court, is not entitled to any weight.

(1) (1870) 7 B.H.C. R. (A.C.J.) 153, 177. (2) (1922) 36 C.L.J. 434.

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Now that Subban has no case on the merits, can he succeed on the point of *res judicata* ? In Original Suit No. 49 of 1906 there was a finding that the money belonged to the five brothers, but, in spite of it, Adaikkalam's suit was decreed. The decree, far from being based on the finding as to the ownership of the money, was made "in spite of it." In such a case, no issue decided against the plaintiff can be *res judicata*. The law on the point may be thus stated. If the decree is wholly in favour of the defendant, no issue decided against him can operate as *res judicata* so as to bind him in a subsequent suit, for he cannot appeal from a finding on any such issue. Conversely, if the plaintiff's suit is decreed in its entirety, no issue decided against him can be *res judicata*, for, he cannot appeal from a finding on any such issue, the decree being wholly in his favour ; see Mulla's Civil Procedure Code, commentary on section 11. The first part of this rule is illustrated by *Run Bahadur Singh* v. *Lucho Koer*(1). The suit was brought by a Hindu against the widow of his deceased brother claiming his property by right of survivorship. The suit was dismissed upon a technical ground, but it was nevertheless found as a question of fact that the brothers were joint in estate. In this case the widow wholly succeeded, although the finding was against her The Judicial Committee held that the finding did not constitute *res judicata* against the widow. *Midnapur Zamindari Company, Ltd.* v. *Naresh Narayan Roy*(2) recognises the same principle. In a suit against certain tenants, they pleaded (i) occupancy right, (ii) that the suit was premature. The High Court dismissed the suit on the ground that the suit was premature, but gave a finding that the tenants had no occupancy right. Their Lordships held

(1) (1884) I.L.R. 11 Calc. 301 (P.C.). (2) (1920) I.L.R. 48 Calc. 460 (P.C.).

that the finding on the question of occupancy rights did not operate as *res judicata* against the tenants as the decree was wholly in their favour and they could not have appealed from the finding (see pages 467 and 485).

The second part of the rule (it is with this we are concerned) is illustrated by *Rango* v. *Mudiyeppa*(1). A, alleging that he was the adopted son of X, sued B to recover certain property granted to him by X under a deed. The Court found that A was not the adopted son of X, but that he was nevertheless entitled to the property under the deed, and a decree was passed for A. A's suit was thus decreed in its entirety, in spite of the finding against him on the question of adoption. It held that that finding did not operate as *res judicata* in a subsequent suit between A and B ; for the decree having been in favour of A, A could not have appealed from the finding that was adverse to him.

But, contends Mr. Sankara Ayyar, the learned Counsel for Subban, the High Court did not give merely a finding, but made it the basis of a part of their decree. As the money was held to be the property of the joint family (Mr. Sankara Ayyar contends), the High Court, in order to safeguard its interests, directed Adaikkalam to give security. The judgment, we must say, is not clear on the point. Was this direction given as a necessary consequence of their finding, or on account of the offer made by Adaikkalam's Counsel ? However, we consider it unnecessary to examine this point further, having regard to our view on the next contention of Mr. Sitarama Rao as to *res judicata*, with which we shall now deal.

That contention, in our opinion, must prevail. In the previous suit, was this question as to the ownership

(1) (1898) I.L.R. 23 Bom. 296.

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of the money directly and substantially in issue between the same parties, that is to say, between Adaikkalam and Subban? It was the zamindar (as we have pointed out) that pleaded that the money was the property of the joint family; Subban, far from pleading that it was its property, alleged that it belonged exclusively to the last three brothers. The other members of the co-parcenary had not been impleaded, and can it be said that Subban was representing the absent members? The case he set up was adverse to their interests, and the point on which the finding in question was given was different from the one he raised. Supposing the finding had been against the joint family, could the absent members have been bound? If it could not have been *res judicata* against them, it could not be *res judicata* in their favour. The mere presence of a party on the record is not decisive of the question when the point of *res judicata* is raised; see *Malhi Kunwar* v. *Imam-ud-din*(1), where it was pointed out that the plaintiff and the newly added defendants were not at issue on the point raised: See also *Ramdas* v. *Vazirsaheb*(2). We cannot accept Mr. Sankara Ayyar's arguments that, because Subban happened to be a party to that suit, he could take advantage of the finding, although his absent brothers could not. In Original Suit No. 49 of 1906, it was not the exclusive title of the last three brothers that was found, but the joint title of all the five. If the Court had found in favour of Subban's case, Adaikkalam would have had no right at all. But, in the present suits, his right to a fifth is admitted by Subban and it is on the footing that each of the other brothers has likewise a fifth share that Subban has now claimed a share for himself. We must therefore decide that

(1) (1904) I.L.R. 27 All. 59. (2) (1901) I.L.R. 25 Bom. 589.

the finding in the previous suit does not constitute *res judicata* in Subban's favour.

The lower Court has also held on the point of *res judicata* against Subban, but on an erroneous ground.

We have thus held that Subban cannot succeed on the point of *res judicata*. We have further held that, on the merits, he is bound to fail. In this view, it is unnecessary to decide the other points raised in the case. The result is that the decree of the lower Court in Original Suit No. 19 of 1924 is confirmed and the Appeal No. 173 of 1929 is dismissed with costs. It follows that Appeal No. 376 of 1924 is also dismissed, but we make no order as to costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

KASARABADA VENKATACHALAPATHI RAO (RESPONDENT), APPELLANT,

v.

GADIRAJU VENKATAPPAYYA AND ANOTHER (APPELLANTS), RESPONDENTS *

1931, September 1.

Code of Civil Procedure (Act V of 1908), sec. 11—Execution of money decree—Attachment of immovable property in—Validity of—Decision as to—Purchaser of that property from judgment-debtor during pendency of proceedings raising question of validity of such attachment not party to such proceedings if and when bound by—Res judicata—Lis pendens—*Applicability of principles of.*

Where, during the pendency of proceedings between the decree-holder and the judgment-debtor raising the question of

* Letters Patent Appeal No. 349 of 1926.