

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

RAM NARAIN (DEFENDANT) v. BISHESHAR PRASAD (PLAINTIFF).*

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March 27.

Civil Procedure Code, s. 13, Explanation v.—Joint Hindu family—Suit against two members—Second suit against third member—Res-judicata.

The plaintiff sued the father and brother of defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property and alleged that he was no party to the suit in which decree had been obtained against his father and brother. His claim was registered as a suit under s. 331 of the Code of Civil Procedure. Plaintiff contended that defendant was concluded by the decree obtained against his father and brother.

Held that a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of s. 13 of the Civil Procedure Code.

Held also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of Explanation V. of s. 13 of the Code of Civil Procedure.

The case of *Narayan Gop Habbu v. Pandurang Ganu* (1) distinguished.

Bisheshar Prasad sued two members in a joint Hindu family for trespass to a certain wall. These members were the father, Chhotu, and one of his sons, Ram Prasad. They alleged that the wall did not belong to the plaintiff, but to them. The dispute was referred to arbitration, and the arbitrator decided in favour of the plaintiff, who obtained a decree in accordance therewith. When the plaintiff took out execution of his decree, he was resisted by Ram Narayan, the second son of Chhotu, on the ground that the wall was ancestral property, and he was no party to the decree obtained against his father and brother. The result of this obstruction was the registration of Ram Narayan's claim as a suit between the plaintiff and him. The plaintiff pleaded *res-judicata*, this plea being founded on the decree he had obtained against Chhotu and Ram Prasad. The Court of first instance disallowed his plea, and found that the wall did not belong to the plaintiff, and altered the former decree. On appeal by the plaintiff the lower appellate Court held that the former decree was binding on Ram Narayan, defendant,

* Second Appeal, No. 1978 of 1886, from a decree of C. Donavan, Esqr., District Judge of Benares, dated the 4th September, 1886, reversing a decree of Pandit Rajnath, Munsif of Benares, dated the 17th April, 1886.

(1) I. L. R., 5 Bom. 655.

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and reversed the decree of the first Court in this case in so as it altered the former decree.

The defendant appealed to the High Court.

Hon. *J. Conlan* and *Munshi Sukhran* for the appellant.

Mr. Howell and *Munshi Juala Prasad*, for the respondent.

EDGE, C. J.—The plaintiff in this suit had in a previous suit sued a father and son, alleging that they had wrongfully opened a door in a certain wall which stood on his land. That was really an act of trespass. The defendants, amongst other defences, alleged that the wall in question was their property and stood on their land. The matter was referred to an arbitrator. The plaintiff got an award in his favour and on that award a decree was passed on the 26th September, 1885. The defendant in this action opposed the execution of the decree upon that award and on the ground that he was no party to the action. It appears that the defendants in the former action and the defendant in this action were and are members of a joint Hindu family; one of the defendants in the former action being the father, the other being the son. The lower appellate Court considered that this case came within Explanation V of s. 13 of the Code of Civil Procedure, and held that the present defendant was concluded by the findings of the arbitrator, although personally he had not been a party to the former action or award. The lower appellate Court also found that the present defendant was aware of the proceedings which were being taken in the former action. I think that we should be careful in applying Explanation V. of s. 13 of the Code of Civil Procedure, and that the Explanation should not be applied to any case which does not come within the very wording of that Explanation. The defendants in the former action did not claim any right in common for themselves or others within the meaning of Explanation V. What they said was, you cannot maintain your action because the wall is ours. They said nothing about other persons being equally interested in the wall, nor does it appear that they were sued or defended the action as representatives of the family. *Mr. Juala Prasad* for the respondent frankly admitted that Explanation V. did not apply to this case. We think it does not. He, however, contended that s. 13 of the Code of Civil Procedure did apply. The parties here were

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not the same parties as those in the former action, nor can the defendant here be said to claim under either of the defendants in the former action. The Hindu son in a joint family, as I understand the law, becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father. He does not claim under his father within the meaning of s 13 of the Code of Civil Procedure. A person is said to claim under another when he derives his title through that other by assignment or otherwise. We have been pressed with the case of *Narayan Gop Habbu v. Pandurang Ganu* (1). In that case the learned Judges found that the other members of the Hindu family whom they held to be bound by the previous proceedings had been actually assenting members of the Hindu family, who had assisted in the previous proceeding the manager of the Hindu family. They evidently treated that manager as a person who had conducted the previous litigation as the representative and on behalf of the whole family. Here the only thing that appears is that the present defendant knew that the previous action and arbitration was going on. We have also been pressed with cases in which it has been held that a decree obtained against a Hindu father for a debt, is binding against the other members of a Hindu family. Those cases are not analogous to the present. They depend, I think, more on the obligation of a Hindu son to pay his father's debts not improperly incurred, and upon the presumption in some of those cases that the action was brought against the father as the representative of the family and the family property. On the face of this case I see no such presumption. In fact, if the father was sued as representative of the Hindu family, it is not easy to see why one of his sons, namely Ram Prasad, was made a defendant with him. In my opinion s. 13 of the Code of Civil Procedure does not apply to this case, and in coming to this conclusion, I am supported by the judgment of my brother Straight in *Ramanand v. Koleshar* (2). The lower appellate Court has not gone into the merits of the case. The case will be remanded for trial under s. 562. This appeal is decreed, and the decree of the lower appellate Court set aside; the costs will abide the event.

MAHMOOD, J.—I concur.

Remanded.

(1) I. L. R., 5 Bom., 685.

(2) Weekly notes, 1887, p. 217.