PRIVY COUNCIL.

P. C.*
1888
May 2.

CHAND KOUR AND ANOTHER (DEFENDANTS) *v.* PARTAB SINGH AND OTHERS (PLAINTIFFS).

[On appeal from the Chief Court of the Punjab.]

Res-judicata—Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss. 13, 102, 103.

The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favor.

Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favor of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1887), Civil Procedure Code.

Held, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen.

APPEAL from a decree (16th May 1884) of the Chief Court, modifying a decree (2nd January 1883) of the Commissioner of the Jullundur division, varying after a remand to the Judicial Assistant Commissioner of the Gurdaspur district, and a return thereto (30th September 1882), a decree (16th May 1882) of the latter Judge.

The suit out of which this appeal arose was brought on the 11th February 1882 by the heirs, brother's sons, of a proprietor deceased in 1848, for a declaration that a gift made in 1879 by his widow, who had succeeded to his estate, would be inoperative as against their rights of inheritance whenever she should die. But the only question on this appeal was as to the application of ss. 102 and 103, Civil Procedure Code.

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Mussamut Chand Kour, the donor, was the widow of Sirdar Kahan Singh, who having gone, with his only son by her, to Multan, in 1849, was there killed, and the son also. Kahan Singh was a sharer to the extent of rather more than 200 ghumaos in villages Aliwal and Man Sandwal in the Gurdaspur district, where the widow remained; and his only other child was a daughter, who in after years had one son, Perak Singh. The widow, on the 29th March 1879, executed the deed of gift, now disputed by the sons of Kahan Singh's brothers, who in this suit claimed a declaration that it should not affect their rights to accrue on the death of the widow. The deed declared: "As I have kept with me my daughter's son, Perak Singh, son of Beja Singh of Majitha, now residing at village Man, from his birth, and have brought him up like a son, therefore I have, without any receipt of money, made a gift in his favor of the following property:" giving a list of Kahan Singh's holdings, according to the *khewat* of the villages above named.

Before this gift was made, on the 1st August 1878, two of the plaintiffs in the present suit, *viz.*, Partab Singh and Golab Singh, sued the widow claiming a declaratory decree, and an injunction forbidding the alienation of Kahan Singh's property. A further petition was filed on 30th August by them, asking that she might be restrained from selling or mortgaging pending the decision of that suit. The plaintiffs failed to appear at the hearing, and the result was that, on the 7th October 1878, the Judicial Assistant Commissioner made the order, which is set forth in their Lordships' judgment, dismissing the suit under s. 102, Civil Procedure Code.

For the defence of the present suit, it was set up that the order, dismissing the former one, barred it. The widow also alleged her right to make the gift to her daughter's son, who had, as she maintained, been adopted by her to Kahan Singh, under a power given to her by him on departing.

The Judicial Assistant Commissioner decreed in favor of the plaintiffs, holding that the present suit was not barred under s. 13, nor was within the provisions of ss. 102, 103 there not having been, in the former suit, any claim to set aside an existing gift. He also found that the alleged power to adopt

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was not proved; and held that the custom of descent, giving the inheritance to the brother's sons, as being nearer than a daughter's sons, could not be set aside.

The Commissioner, after a remand for further evidence, found the authority to adopt had not been established. He supported the gift only so far as it might relate to the widow's own estate. The decree of the lower Court was accordingly, in the main, upheld.

Both parties appealed to the Chief Court. That Court (Baden-Powell and Burney, JJ.) held that the suit was not brought upon the same cause of action as the previous one had been; the gift having been a new and subsequent act. The suit might, therefore, be maintained. As to the alleged adoption, the Judges were of opinion that, though something might have been said by the Sirdar, on his going on military service with his son, about the succession in the event of his death, no such proof of definite authority to adopt had been given as would be necessary before the ordinary course of succession could be set aside.

The result was a decree in the plaintiffs' favor, declaring that the deed of gift of 29th March 1879 was void and of no effect in respect of all the lands which it purported to convey to Perak Singh, as against the plaintiffs' reversionary interests.

On this appeal,—

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the appellants, argued that the suit of 1878, having been dismissed under s. 102, the present suit fell within the prohibition of s. 103. The claim then made was more general than the present, having in view any mode of alienation by the widow, which it sought to have prohibited. The widow's making a deed of gift was included in the general term alienation. If a claim or ground arose out of, and depended upon, the same right as that which was in question in the former suit, it would come under s. 13 as *res judicata*. *Hunter* v. *Stewart* (1), *Thakur Shankar Baksh* v. *Daya Shankar* (2) were referred to.

The respondents did not appear.

(1) 13 L. J. Ch., 349.
(2) L. R., 15 I. A., 66; I. L. R., 15 Calc., 422.

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Their Lordships' judgment was delivered by

LORD WATSON.—In this case the defendants in the original suit, who bring this appeal, are: (1) Mussamut Chand Kour, widow of the late Kahan Singh; and (2) Perak Singh, to whom the first appellant in 1879 made over by deed of gift the fee of her deceased husband's estate. The plaintiffs and respondents are the four nearest agnates of Kahan Singh, and the present suit was instituted by them for the purpose, *inter alia*, of obtaining a declaration that the widow's gift is inoperative and cannot affect their reversionary rights. It is admitted that Chand Kour has merely a widow's interest in the estate; and it is also admitted that Perak Singh, in whose favour she executed the deed of gift, is a stranger to the succession. The only point which has been argued on behalf of the appellants is, that the suit is barred by certain proceedings in a suit which was begun and concluded, in the Court of the Judicial Assistant Commissioner, before the date of the deed of gift. That action was instituted by two of the respondents, Partab Singh and Golab Singh, and their plaint prayed for a declaratory decree, and for an injunction forbidding alienation of the moveable and immoveable property of the deceased, which was then in the possession of his widow. The plea in bar can only affect these two respondents, and cannot exclude the other respondents from obtaining a declaratory decree in this suit, which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants.

The proceedings which followed upon the plaint in the suit referred to were these: A defence was lodged for the widow, and on the 7th October 1878 the Judicial Assistant Commissioner pronounced this order, which has become final: "As the plaintiff has not appeared, though waited for up to the rising of the Court, and as the defendant, who is represented by her agent, denies the plaintiff's claim, it is ordered that the case be struck off under s. 102, Civil Procedure Code."

The provisions of ss. 102 and 103 of Act X of 1877 require therefore to be considered. The dismissal of a suit in terms of s. 102 was plainly not intended to operate in favour of the defendant as *res judicata*. It imposes, however,

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when read along with s. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The Judge of first instance, the Assistant Commissioner, held that the cause of action set forth in the present plaint is not the same with that disclosed in the plaint of 1878. The Commissioner differed from that view, but it was upheld by two Judges of the Chief Court of the Punjab upon appeal. Their Lordships are of opinion that the decision of the Assistant Commissioner and of the Chief Court is in accordance with the Statute. The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right by selling it, in whole or in part, or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in an allegation that the first defendant has in point of fact made a *de præsenti* gift of their whole interest to a third party, who is the second defendant. That of itself is a good cause of action if the appellants' right is what they allege. It is a cause of action which did not arise, and could not arise until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878.

It appears to their Lordships that the two grounds of action, even if they had both existed at the time, are different. If there had been a deed of gift in 1878 it might have afforded another and separate ground for granting the remedy which was prayed in that suit; but in point of fact it did not exist; and it is impossible to say that a cause of action, which did not exist at the time when the previous action was dismissed, can be regarded as other than a new cause of action subsequently arising.

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Under these circumstances their Lordships are of opinion that the judgment appealed from ought to be affirmed, and the appeal dismissed, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

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KAMINI DEBI (PLAINTIFF) *v.* ASUTOSH MUKERJI AND OTHERS (DEFENDANTS).

ASUTOSH MUKERJI AND OTHERS (DEFENDANTS) *v.* KAMINI DEBI (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Res judicata—Civil Procedure Code, s. 13—*Substantial matters in issue decided in a former suit—Right of shebait-ship of a family deb-sheba under a will.*

A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the *prosad*, "offerings to the deity."

One or other of the brothers then for some years managed the estate as shebaits, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait.

In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it.

Held, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to be shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will, constituting,

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