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Sessions Judge had been right in his views and the case had been a case of culpable homicide, the sentence is inadequate. Taking it as a case of culpable homicide, it is about as bad a case of culpable homicide as can be conceived and was a case in which the maximum sentence allowed by the law should have been inflicted We inflict that sentence now by enhancing the sentence of seven years' rigorous imprisonment into one of transportation for life.

Sentence enhanced.

APPELLATE CIVIL.

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January, 20.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MUHAMMAD AHMAD (PLAINTIFF) *v.* ZAHUR AHMAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), section 11—Res judicata—Application of the doctrine of res judicata to persons who were co-defendants in the former suit.

A decision as between co-defendants cannot be *res judicata* under the provisions of section 11 of the Code of Civil Procedure unless it was necessary to decide an issue between them in order to grant relief to the plaintiff

Mohammad Hashmat Ali v. *Kaniz Fatima* (1) and *Somasundara Mudali* v. *Kulandaivelu Pillai* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court.

The facts of the case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Mr. *G. W. Dillon*, Dr. *S. M. Sulaiman*, Mr. *Hamidullah*, Mr. *S. A. Haidar* and Maulvi *Iqbal Ahmad*, for the respondents.

MEARS, C. J., and BANERJI, J. :—The question which arises in this appeal is whether the suit of the plaintiff is barred by the rule of *res judicata*. For the purpose of determining this question, it is necessary to state a few facts. One Karim-ullah died many years ago leaving a widow, Musammat Sabi-un-nissa, a son, Nizam-ud-din, and two daughters. Khurshed Jahan and Kaniz Fatma. Disputes arose between the heirs of Karim-ullah,

* Appeal No. 12 of 1920, under section 10 of the Letters Patent.

(1) (1915) 13 A. L. J., 110. (2) (1904) I. L. R., 28 Mad., 457.

and a suit was brought by Khurshed Jahan, one of the daughters, for her share in the estate of Karim-ullah. That suit was compromised and a decree was passed on the basis of the compromise in 1868. According to the compromise and the decree, Khurshed Jahan relinquished her claim to the estate left by her father, and as to the property which was found by arbitrators in that case to be the property of her mother, Musammat Sabi-un-nissa, she also relinquished the rights she might acquire in that property upon the death of her mother. This relinquishment was for a consideration. As stated above, the terms of the compromise were embodied in a decree and the decree was passed as between Khurshed Jahan and her sister Kaniz Fatima as also the other heirs of her father. Khurshed Jahan died. Nizam-ud-din executed a sale-deed in favour of three persons, namely, the present plaintiff Muhammad Ahmad, Muhammad Kasim and Mushtaq Ahmad. Muhammad Kasim having died, his son Hashmat Ali, brought a suit in 1912, which was suit No. 24 of that year, for possession of the property sold to his father by Nizam-ud-din as also a share of the property which, he alleged, had been inherited by him from Musammat Khurshed Jahan, who was his wife. In that suit several houses were claimed. The present plaintiff, Muhammad Ahmad, was made a defendant, because he was one of the purchasers under the sale-deed executed by Nizam-ud-din. The suit was for partition of the share which was claimed by Hashmat Ali and for possession. The case was tried and, in the end, the claim of Hashmat Ali was dismissed in respect of the property purchased from Nizam-ud-din on the ground that Nizam-ud-din had previously sold his interest in the property and had, therefore, no right to convey it to the persons who obtained a sale-deed from him. As regards the property which was claimed by right of inheritance to Khurshed Jahan, the claim was dismissed on the ground that Khurshed Jahan had abandoned her rights in the property and, therefore, none passed to her heirs. Subsequently to the passing of this decree, the present suit was instituted by Muhammad Ahmad, and he claimed the share Nizam-ud-din had sold to him under the sale-deed to which we have referred above and also a share in the property in dispute which he claimed to have inherited from his

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mother Khurshed Jahan. The present suit relates to only one of the houses claimed in the previous suit.

The court of first instance dismissed the suit on the ground of *res judicata*. It held that the matter was *res judicata* by reason of the decision in the suit brought by Hashmat Ali in 1912 and also by reason of the decree which was passed in 1868.

The lower appellate court affirmed the decree of the court of first instance holding that the matter was *res judicata* in consequence of the decision in the previous suit brought by Hashmat Ali.

This decree of the lower appellate court was affirmed by a learned Judge of this Court.

In the appeal before us it is contended that the view of the lower appellate court and of the learned Judge of this Court that the claim is barred by the rule of *res judicata* by reason of the decision in the suit of Hashmat Ali, is erroneous and that section 11 of the Code of Civil Procedure cannot be held to apply to the present case. For the decision of the question of *res judicata*, we deem it desirable to consider the case from two different aspects. The claim relates to different shares in the house which is the subject-matter of the suit. As regards one share, which is about 1/6th, the claim is based on the sale-deed executed by Nizam-ud-din. As regards the remainder of the share claimed, the suit of the plaintiff is founded on his right of inheritance as the son of Musammat Khurshed Jahan As regards the latter claim, that is, the claim based on the right of inheritance to Khurshed Jahan, the court of first instance, as we have said above, held that by reason of the decision in 1868 the plaintiff had no right and also that the matter was *res judicata*. We think that this view of the court of first instance is correct. In the suit which was decided in 1868 a decree was passed against Khurshed Jahan, the effect of which was that Khurshed Jahan was not entitled to any part of the property claimed, whether as the heir to her father or as the future heir of her mother. That decree was passed between Khurshed Jahan and Kaniz Fatma and the predecessors in title of the other defendants to the present suit. Therefore, unless the decree was tainted with fraud or was procured by undue influence, that decree will be binding on

Khurshed Jahan and every person claiming title through her. It was not asserted, nor is it now claimed, that the decree was obtained by fraud or by undue influence. Therefore the decree is a valid decree which is binding between the parties to the present suit. Furthermore, we have to consider the effect of that decree, and it is urged that the effect of it is that Khurshed Jahan did not lose the right which she might acquire in her mother's property after her death. This question of the right of Khurshed Jahan is concluded by the decision of this Court in the case of *Mohammad Hashmat Ali* v. *Kaniz Fatima* (1). In accordance with that ruling Khurshed Jahan had lost all right in the property including the property now in suit, and the plaintiff cannot claim any share in that property as one of the heirs of Khurshed Jahan. This part of the plaintiff's claim has, therefore, been rightly dismissed, though as we shall show hereafter the view that the decision in Hashmat Ali's case operates as *res judicata* is, in our judgment, not correct.

We have now to deal with the remainder of the plaintiff's claim, that is, with that part of the claim which is based on the purchase from Nizam-ud-din. As to this part of the claim the courts below have held that inasmuch as Muhammad Ahmad, the present plaintiff, was a party to the suit brought by Hashmat Ali and that suit was dismissed on the ground that Nizam-ud-din had no title to the property which he sold, the matter has become *res judicata*. We are unable to agree with this view. The rule of *res judicata* is laid down in section 11 of the Code of Civil Procedure. Under the provisions of that section an issue which arises in a subsequent suit should not be tried by the court if the same issue has been tried in a previous suit between the same parties or persons through whom they claim, and this trial has been by a court competent to try both the suits. Now in the present suit, the matter in issue is whether the plaintiff Muhammad Ahmad has acquired by reason of his purchase from Nizam-ud-din the share which he claims in the house in dispute. In the previous suit this was not the issue before the court. The issue in that suit was whether Hashmat Ali had acquired the share which he claimed by virtue of the sale-deed

(1) (1915) 18 A.L.J., 110.

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executed in his favour by Nizam-ud-din. The issue, therefore, in the present suit was not identical with the issue which arose in the previous suit and the question of the title of Muhammad Ahmad, the present plaintiff, was never decided in that suit. It is true that he was a defendant to that suit, but a decision as between co-defendants cannot be *res judicata* under the provisions of section 11, unless it was necessary to decide an issue between the co-defendants in order to grant relief to the plaintiff. This has been held in numerous cases to which it is not necessary to refer. As between the present plaintiff and the defendants to this suit, no issue was tried in the previous suit and no issue could be tried for the purpose of determining the question of the title of Hashmat Ali. The present plaintiff does not derive title from Hashmat Ali and any decision which was arrived at between the present defendants and Hashmat Ali cannot, therefore, be binding upon the present plaintiff.

Explanation IV of section 11 was relied upon in the argument before us: but that Explanation does not, in our opinion, afford any help to the respondents. Under that Explanation, a party to a suit, who could and ought to have put forward a claim or a defence but does not do so, cannot be allowed to set up the claim or the defence in a subsequent suit. In the suit of Hashmat Ali, Muhammad Ahmad was a defendant and he could not put forward his present claim as a defence to the suit of Hashmat Ali. Therefore, in our opinion, Explanation IV has no application to the present case. It was urged that, as the suit of Hashmat Ali was a suit for partition, all parties having an interest in the property were necessary parties to the suit and the title of the defendants, who were co-sharers of the plaintiff, could be determined in that suit. No doubt, in a suit for partition where the rights of different persons interested in the property as co-sharers have to be determined and have been so determined, the decision might operate as *res judicata* although the plaintiff in the subsequent suit may have been a defendant in the previous suit. But that was not the case here. In Hashmat Ali's suit no question had to be determined as to the respective rights of Hashmat Ali and Muhammad Ahmad. Muhammad Ahmad had no defence to the claim of Hashmat Ali and he was not at all

concerned with the share which was claimed in that suit by Hashmat Ali. The decision in the previous suit did not affect any question of partition of the respective shares of Hashmat Ali and Muhammad Ahmad. In a suit of this nature, in which a co-sharer was made a defendant simply because he had an interest in the property which was claimed, a decision between the plaintiff and other defendants could not be held from any point of view to have the effect of *res judicata* as between the defendants whose title was not in issue and was never determined in the previous suit. This case very much resembles the case of *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) which has been cited to us. The ruling in that case fully supports the view which we have expressed above.

The result is that the appeal must be dismissed as regards the share claimed as heir to Musammat Khurshed Jahan. As regards the share claimed by virtue of the purchase from Nizam-ud-din, the decree of this Court and of the courts below must be set aside and the case remanded to the court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. In so far as the costs of the litigation relate to the share in regard to which the claim has been dismissed, the plaintiff must bear the costs of the defendants in all courts proportionately to the portion of the claim dismissed. As regards the remainder of the claim, costs here and hitherto will be costs in the cause.

Decree set aside and cause remanded.

FULL BENCH.

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January, 20.

Before Mr. Justice Pigott, Mr. Justice Lindsay and Mr. Justice Gokul Prasad.

IN THE MATTER OF MUHAMMAD MUZAFFAR ALI.*

Act No. II of 1899 (Indian Stamp Act), schedule I, article 33—Stamp—Deed of gift—Value of property not stated.

If in a deed of gift the value of the property dealt with is not set forth, the deed does not require any stamp, and it is not within the competence of the Collector to have the said property valued in order to assess the duty payable. If, however, the value of the property is intentionally omitted with a

* Civil Miscellaneous No. 195 of 1921.

(1) (1904) I. L. R., 28 Mad., 457.