Before Mr. Justice Boys and Mr. Justice Kendall.

HUB LAL (PLAINTIFF) *v.* GULZARI LAL (DEFENDANT).* 1927 January, 21.

Civil Procedure Code, section 11—Res judicata—*Wrong decision on a point of law—Pecuniary jurisdiction—Bearing of the question of pecuniary jurisdiction on the application of the doctrine of* res judicata.

It is not a correct proposition of law that the pecuniary jurisdiction of the trial court has no bearing on the application of the principle of *res judicata;* where the pecuniary jurisdiction of the court which tried the first suit was not sufficient to enable it to try the second, the principle of *res judicata* will not apply.

Shahzade Singh v. *Muhammad Mehdi Ali Khan* (1) and *Sheikh Hassu* v. *Ram Kumar Singh* (2), referred to.

An erroneous decision on an issue of law can be the basis of a plea of *res judicata. Mangalathammal* v. *Narayanswami Aiyar* (3), dissented from.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *K. N. Laghate*, for the appellant.

The respondent was not represented.

BOYS and KENDALL, JJ. :—This is a plaintiff's appeal in a suit for damages on the allegations that the defendant had wrongfully cultivated the plaintiff's share, a joint holding, and that the defendant had further cut certain trees and taken certain fruit from groves belonging to the plaintiff. We will deal first with the question of joint tenancy. The trial court held that the plaintiff's joint ownership of the tenancy was *res judicata*, and decreed the plaintiff's claim, allotting him Rs. 531-10-0 as damages. It is admitted on behalf of both parties that there were

*Second Appeal No. 65 of 1925, from a decree of Mohammad Ziaul Hasan, Subordinate Judge of Mainpuri, dated the 14th of November, 1924, reversing a decree of Ghanshiam Das, Munsif of Etawah, dated the 21st of December, 1923.

(1) (1909) I.L.R., 32 All., 8. (2) (1894) I.L.R., 16 All., 189
(3) (1907) I.L.R., 30 Mad., 461.

1927

HUR LAL v. GULZARI LAL.

two previous suits in 1916 and 1920, in which the question of ownership had been decided in favour of the plaintiff. The lower appellate court, however, held that the matter was not *res judicata* because the plaintiff's title was based on his acquisition by sale and foreclosure of a certain share in an occupancy holding, and that such a title was void under the provisions of the Tenancy Act. It further held that a wrong decision on a point of law could not be the basis of a plea of *res judicata*, and in support of this proposition it relied on the decision of the Madras High Court in *Mangalathammal* v. *Narayanswami Aiyar* (1) in which it was held that

"It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal of a question of law *directly and substantially in issue between the parties in a* suit does not prevent a court from deciding the same question arising between the same parties in a subsequent suit *according to law.*"

We are, however, unable to concur in this expression of opinion. In our view, the words of section 11 of the Code of Civil Procedure are clear that "No court shall try any suit in which the matter directly and substantially in issue has . . . " There is, in our view, nothing in these words to limit the matter in issue to an issue of fact. On behalf, however, of the respondent a further reason has been urged in support of the plea that the matter was not *res judicata*. This reason is that while the first suits were within the competency of the court which tried them, that court could not have tried the present suit by reason of the fact that the valuation of the suit was in excess of the pecuniary jurisdiction of the court which tried the earlier suits. The facts as regards the pecuniary jurisdiction of the two courts are not denied

(1) (1907) I.L.R., 30 Mad., 461.

by the appellant. We think, therefore, that the respondent's contention must be accepted that the first court was not competent to try the present suit. It is not sufficient that the first court should have been competent to try one or other of the issues. Section 11, when split into its two parts, is clear, firstly, that "*No court shall try any suit* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a court *competent to try such subsequent suit* and has been heard and finally decided by such court," and, secondly, that "*No court shall try any issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a court *competent to try the suit in which such issue has been subsequently raised*, heard and finally decided by such court." It is clear, when the section is thus split up, that in both cases the trial court must have been competent to try the later suit and not merely an issue in the later suit. On behalf of the appellant reliance has been placed on *Shahzade Singh* v. *Muhammad Mehdi Ali Khan* (1) as supporting the proposition that the pecuniary jurisdiction of the trial court has no bearing on the application of the principle of *res judicata*. We think, however, that this contention is unfounded. In that case it was urged that the fact that the trial court, a revenue court, had only jurisdiction up to Rs. 100, and the suit in the later civil court was valued at Rs. 250 did not prevent the application of the principle of *res judicata*, but the *ratio decidendi* was not that the question of the valuation of the suit

(1) (1909) I.L.R., 32 All., 8.

1927

HUR LAL v. GULZARI LAL.

was immaterial, but that the revenue court deciding the question of title must be deemed to be the civil court of lowest jurisdiction which would have been competent to try the suit, if the parties had been referred to a civil court. If it were to be deemed such civil court, that civil court would have had power to try the later suit. The case, therefore, does not support the contention of the appellant. On the other hand, we have been referred by the respondent to *Sheikh Hassu* v. *Ram Kumar Singh* (1). We think, therefore, that though the rejection of the plea of *res judicata* cannot be supported for the reason given by the lower appellate court, yet for the other reason which we have stated the question of the plaintiff's title was not *res judicata*. If the matter then is open to decision in the present suit, there can be no question but that the plaintiff did not, in virtue of the terms of the Tenancy Act, acquire a title in the occupancy holding by his sale and foreclosure. That being so, his claim for a declaration of his share and damages must fail.

We now turn to consider the plaintiff's claim so far as it concerns the groves and damages for cutting the trees and taking the produce of those groves. The trial court held that in certain suits between the parties the land in question had been held to be groves. In this case it did not hold that the matter was *res judicata*, but went on to say that there was no reliable evidence to the contrary. It further held that the prior suits showed that the plaintiff owned all of the groves except two of them, and finally on the evidence held that the defendant was in possession and had taken the produce; and it gave the plaintiff damages in two amounts of Rs. 141-2-9 and Rs. 93-5-4. The lower appellate court did not refer in regard to

(1) (1894) I.L.R., 16 All., 183.

1927

HUB LAL v. GULZARI LAL.

these matters to the prior suits or to the question of *res judicata;* but in view of our decision above as to the application of the principle of *res judicata* to the joint tenancy, it is clear that the lower court was right so far in its dealing with these issues. It did, in fact, reject the plaintiff's claim on the ground that there had been a partition in 1917. No attack on the finding in this respect has been made before us in appeal, and it is, therefore, unnecessary for us to further consider this question. The lower appellate court, after considering the partition and matters bearing thereon, arrived at the conclusion that "the plaintiff respondent has totally failed to substantiate his claim." The result is that the appeal fails in its entirety, and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

HUSAINI BEGAM (PLAINTIFF) *v.* MUHAMMAD MEHDI (DEFENDANT).*

1927

January, 24

Muhammadan law—Shias—Will—Legacy—Consent of heirs—Death of legatee in lifetime of testator.

According to the Shia law a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs; but where it exceeds one-third, it is not valid without the consent of all the heirs. Such consent may be given either before or after the death of the testator.

If a legacy is not addeemed by the testator, the death of the legatee does not cause a lapse, but the legacy descends to the legatee's heirs.

Fahmida Khanum v. *Jafri Khanum* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

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* First Appeal No. 4 of 1924, from a decree of Hanuman Prasad Varma, Subordinate Judge of Bijnor at Moradabad, dated the 18th of September, 1923.

(1) (1908) I.L.R., 30 All., 153.