

APPELLATE CIVIL.

1881
June 30.*Before Mr. Justice Tyrrell and Mr. Justice Duthoit.*

SULTAN AHMAD AND OTHERS (PLAINTIFFS) v. MAULA BAKHSH (DEFENDANT).*

Act X of 1877 (Civil Procedure Code), s. 13, Ex. II.

B, who held a decree for money against *I*, caused certain property to be attached in execution of such decree as the property of his judgment-debtor. *M*, the wife of *I*, objected to such attachment, claiming such property as her own. Her objection was disallowed, and she consequently brought a suit against *B* to establish her right to such property. She died while that suit was pending, leaving by will such property to her sons. That suit proceeded in the names of her sons, who claimed such property under such will. The lower Courts only decided in that suit that such property belonged to *M*, and not to *I*, and it was therefore not liable to be sold in execution of *B*'s decree against the latter. They did not consider the question whether *M*'s sons were entitled to such property under their mother's will. In second appeal in that suit *B* contended that *I*, as a heir to *M*, was entitled to a fourth share of such property, and such share was liable to be sold in execution of such decree. *M*'s sons did not contend before the High Court that they were entitled to the whole of such property under their mother's will to the exclusion of *I*. The High Court allowed *B*'s contention. *B* brought a fourth share of such property to sale in execution of his decree and purchased it himself. Thereupon *M*'s sons sued him for such share claiming it under their mother's will. Held that their mother's will was a matter which should have been made a ground of defence by *M*'s sons in the course of the trial of the second appeal in the former suit between them and *B*, and that, not having been so made, it was *res judicata* in the sense of s. 13, Explanation II, Act X of 1877.

MAULA BAKHSH, the defendant in this suit, who held a decree for money against one Imam Bakhsh, caused a certain house to be attached in execution of such decree as the property of his judgment-debtor. Objection to this attachment was taken by Mammo, wife of Imam Bakhsh and mother of the plaintiffs in this suit, who claimed such house as her own property. Her objection was disallowed, and she accordingly brought a suit against Maula Bakhsh to establish her right to such house. She died while that suit was pending, leaving by will such house to her sons. That suit proceeded in the names of her sons. They set up as a defence to it that they had succeeded to such house by virtue of their mother's will. The lower Courts only decided in that suit that such house belonged to Mammo and not to her husband, and that it was

* Second Appeal, No. 1353 of 1880, from a decree of C. J. Daniell, Esq. Judge of Moradabad, dated the 11th September, 1880, affirming a decree of Maulvi Ainsuddin, Munsif of the City of Moradabad, dated the 2nd June, 1880.

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therefore not liable to be sold in execution of a decree against the latter. They did not consider the question whether Mammo's sons had succeeded to such house under their mother's will. The High Court decided on second appeal by Maula Bakhsh (Second Appeal No. 1346 of 1877, decided the 5th March, 1878,) that, as one of the heirs to his wife, Imam Bakhsh was entitled to one-fourth of such house, and such share was liable to be sold in execution of Maula Bakhsh's decree. Mammo's sons did not contend before the High Court that they were entitled to such house under their mother's will to the exclusion of their father. Maula Bakhsh having brought to sale one-fourth of such house in execution of his decree against Imam Bakhsh and purchased it himself, Mammo's sons instituted the present suit against him for possession of such share, claiming under their mother's will. The Court of first instance dismissed the suit on the ground that it was barred by limitation and that the will was not genuine. On appeal by the plaintiffs the lower appellate Court affirmed the decree of the Court of first instance on the ground that the plaintiffs might, when respondents in the second appeal in the former suit, have set up as a defence that they were entitled to the whole of such house under their mother's will, and Imam Bakhsh was not entitled to any share of it as an heir to their mother, and as they did not set up such defence, the question of their right under such will was *res judicata* under s. 13 of Act X of 1877.

The plaintiffs appealed to the High Court contending that such matter was not *res judicata*.

Mr. Conlan and Shah Asad Ali, for the appellants.

Babu Oprokash Chandar Mukarji, for the respondent.

The judgment of the Court (TYRRELL, J., and DUTHOIT, J.,) was delivered by

TYRRELL, J.—Their mother's will was plainly a matter which should have been made a ground of defence by the respondents in the course of the trial here in the appeal No. 1346 between the same parties. It was not so made, and the lower appellate Court has rightly found that this plea must now be deemed to be *res judicata* in the sense of Explanation II, s. 13 of Act X of 1877. The appeal fails and is dismissed with costs.