APPELLATE CIVIL.

Before Mr. Justice Brown.

1929

Jan. 8.

MA SHIN

v.

MAUNG HAN AND OTHERS.*

Res judicata—*Civil Procedure Code (Act V of 1908), s. 11, Explanations II and IV—Adjudication between co-defendants to be* res judicata, *requisites of.*

In a former suit the parties to the present appeal and another were defendants. They were sued on an alleged agreement for partition of ancestral land which some of the defendants were said to hold on behalf of all the heirs. The present appellant admitted the claim of the plaintiffs in that suit, but the present respondents contested it and the suit was dismissed on the ground that the latter had been dealing with the land as their own and that the contract was not proved. Appellant then sued the respondents in the present case for half of the same land. She alleged that the land at one time belonged to her late husband and the 1st respondent, that there was an agreement between them to repurchase it from the person to whom they sold it, and that the 1st respondent having so repurchased it was bound to give her the half on her payment of half the purchase price. Respondents contended that the appellant ought to have set up her case as a ground of defence in the former suit and that not having done so, the present suit was barred on the principle of *res judicata.*

Held, that only one of the conditions requisite for an adjudication to be *res judicata* as between co-defendants existed in the present case, *viz.*, a conflict between the persons who were co-defendants in the former suit. But the other two requisites were absent, *viz.*, the relief claimed by the plaintiffs in the former suit was entirely independent of the appellant's present claim the raising of which in the former suit could have made no difference to the decision in the former suit. It was not necessary in the former suit to decide this point and the judgment in the former suit neither directly nor impliedly decided it. If the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised that defence must under s. 11 be deemed to have been finally decided against the person who ought to have raised it. These conditions being not fulfilled in the present case, the matter was not *res judicata.*

Ma Tok v. *Ma Yin*, 3 Ran. 77 ; *Maung No* v. *Maung Po Thein*, 1 Ran. 363—*referred to.*

S. C. Das for the appellant.

Thein Maung for the respondents.

* Civil Second Appeal No. 532 of 1928 against the judgment of the District Court of Bassein in Civil Appeal No. 78 of 1928.

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BROWN, J.—In Civil Regular No. 42 of 1927 of the Subdivisional Court of Kyonpyaw one Maung Aung Ban and two others sued the parties to the present appeal and one other for specific performance of a contract. Their allegation was that the land in suit had originally belonged to the parents of the plaintiffs and of all but one of the defendants.

About 1914, the present respondent, Maung Han, and Maung Nge, the husband of the present appellant, Ma Shin, on behalf of all the heirs made over the land in satisfaction of a mortgage debt, reserving the right of re-purchase. About four years later, with the consent of all the heirs, Maung Han and Maung Nge re-purchased the land on behalf of all these heirs, and it was agreed amongst the heirs, that, when the purchase money was re-paid to Maung Han and Maung Nge, the land would be divided amongst all the heirs. They, therefore, asked for a partition of the land on payment of their proportionate shares.

The present appellant, Ma Shin, admitted the plaintiffs' claim in that suit, but the suit was contested by the present respondents, Maung Han, Maung Myan and Po Hla. The suit was eventually dismissed. It was held that Maung Han and Maung Myan had been dealing with the land as their own.

As regards the alleged promise to partition the land at the time of re-purchase, the finding was somewhat vague ; but apparently it was held that the contract was not proved.

In the present case Ma Shin has sued the three respondents with regard to the same piece of land. She now says that the land in question was purchased by her husband, Maung Nge, and Maung Han from a Chettyar firm ; and that, in 1914, Maung Nge and Maung Han mortgaged the land to Po

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Hla. Later on they transferred the land outright to Po Hla with an option of re-purchase.

In the year 1919 this option of re-purchase was exercised by the 1st defendant, Maung Han. Maung Nge has since died and Ma Shin claims that Maung Han must be held to have re-purchased for himself and for Maung Nge, and she asks for half of the land on payment of half the purchase money Rs. 920.

The suit is contested by Maung Han and Maung Myan and has been dismissed on a preliminary point. The trial Court has held that the suit is barred by the principle of *res judicata* on account of Civil Regular No. 42 of 1927, and this decision has been upheld on appeal by the District Court. It is against this decision that the present appeal has been filed.

The learned District Judge was of opinion that the case now set up by the appellant was a case which ought to have been set up as a ground of defence in the earlier suit. It is difficult to see how the present case would have been a good defence to the earlier suit. The question in that suit was whether the plaintiffs had the right to obtain a share in the land by virtue of a contract entered into by them and the other heirs. Ma Shin's present case is that the land actually belonged to her husband and to Maung Han, and it is on that ground that she is now claiming a share. But this case is not necessarily inconsistent with the case set up by the plaintiffs in the former suit. Even if the land were actually owned by Maung Nge and Maung Han only, that fact would not necessarily negative the possibility of a contract, whereby they agreed to partition the land on payment of the proportionate shares by the other heirs. Further, the District Judge does not seem to have given sufficient attention to the fact that in the former

suit the contesting parties were Maung Aung Ban and two others on one side and all the present defendants on the other.

The conditions requisite for an adjudication to be *res judicata* as between co-defendants were discussed in the case of *Ma Tok and nine* v. *Ma Yin and seven* (1). It was there laid down that the following conditions should be fulfilled before the principle of *res judicata* could apply :—

(i) that there should be a con flict of interest between the co-defendants ;

(ii) that it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit , and

(iii) that the judgment should contain a decision of the question raised as between the co-defendants.

Now, there is a conflict in the present case between the persons who were co-defendants in the earlier suit ; but in that suit the relief claimed by the plaintiffs was based on an alleged contract which is entirely independent of the claim now put forward by Ma Shin. Their success depended on whether they could prove that contract. A decision on the points now raised by Ma Shin could have been of no avail whatsoever to them in that suit, and the raising of the present claim by Ma Shin could have made no difference whotsoever to the decision of the earlier case. It was not necessary to decide this point in the earlier suit ; nor can the judgment either directly or impliedly be held to contain a decision of the question now raised.

I have been referred on behalf of the respondents to the case of *Maung No and one* v. *Maung Po Thein and six others* (2). In that case the following

(1) (1925) 3 Ran. 77, at p. 79. (2) (1923) 1 Ran. 363, at pp. 365, 366.

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observations by a Bench of the Calcutta High Court in an earlier case were quoted with approval with reference to Explanation IV of section 11, Code of Civil Procedure :—

> A matter which ought to be raised but which as matter of fact is not raised in a suit cannot be decided in specific terms in that suit. But this fact cannot be fatal to the plea of *res judicata*, for in that case it is obvious that Explanation II (of section 13 of the former Code) would be meaningless. We must take it therefore that if the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, that defence must under section 13 be deemed to have been finally decided against the person who ought to have raised it.

With these remarks I entirely agree. But they do not seem to me to be of any assistance to the respondents in the present case. The decision in the former suit was to the effect that the plaintiffs in that suit had failed to prove their rights as heirs on a contract to a share in the land. It is quite impossible to hold that this decision is necessarily inconsistent with the case now put forward by Ma Shin. It is true that when the claim of *res judicata* is based on Explanation IV, section 11, it is not necessary that there should have been any express decision on the matter which ought to have been made a ground of defence or attack. But for the provisions of the sections to be operative at all, the issue, or the matter in issue, must have been heard and finally decided in the earlier case ; that is to say, the decision in the earlier case must have been such as to imply an adverse finding on the matter which ought to have been made a ground of defence or attack. These conditions are not fulfilled in the present case ; and, in my opinion, the present suit is not barred as *res judicata*.

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It has been suggested by the learned advocate that when Ma Shin was examined as a witness in the earlier case her statements were not entirely consistent with the case she now puts forward; but I am not now concerned with the merits of her present case.

The sole question for decision at present is whether the suit is barred as *res judicata*, and on that point I must hold that the appellant is entitled to succeed.

I, therefore, set aside the judgments and decrees of the lower Courts and direct that the suit be re-opened and tried on its merits by the trial Court.

The appellant will be entitled o a refund of the court-fees paid by her in this Court and in the District Court. The balance of her costs in the District Court and in this Court will be paid by the respondents.

APPELLATE CIVIL.

Before Mr. Justice Brown.

1929

Jan. 11.

U MAUNG GYI
v.
MAUNG ON BWIN AND ANOTHER.*

Burden of proof—Dispossession, adverse possession—Limitation Act (IX of 1908), *Sch. I, Arts.* 142, 144*—Averment by plaintiff of permissive use—Defendant's occupation over twelve years—Burden of proof on plaintiff to show dispossession within twelve years on failure to prove permissive use.*

Ordinarily in a suit under Art. 142 of the Limitation Act, the burden of proof would lie on the plaintiff, and in a suit under Art. 144 it would lie on the defendant. Where a plaintiff avers that he was at one time the owner of immoveable property and that the defendant obtained possession from him, his suit falls under Art. 142, and on his failing to prove the permissive

* Special Civil Second Appeal No. 529 of 1928 against the judgment of the District Court of Amherst in Civil Appeal No. 139A of 1928.