

APPELLATE CIVIL.

Before Mr. Justice Fforde and Mr. Justice Campbell.

MUSSAMMAT SAHIBZADI BEGUM

(PLAINTIFF) Appellant

versus

MUHAMMAD UMAR AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 1514 of 1922.

Res Judicata—rule of—whether confined to section 11 of the Civil Procedure Code, Act V of 1908.

The question of the respective rights of the parties to the present suit as heirs of one *Mussammata* A. B. had been decided in a previous suit, but the trial Court held that the plea of *res judicata* could not, under the provisions of section 11 of the Code of Civil Procedure, be sustained as the present suit was not triable by the *Munsif*, who tried the previous suit.

Held, that the rule of *res judicata* is not confined to the provisions of section 11 of the Code, but may be invoked under general principles of law and in the present case the previous decision should be held to be a final decision between the two parties of their rights in the estate of *Mussammata* A. B.

Hook v. Administrator-General of Bengal (1), and *Ramachandara Rao v. A. N. S. Ramachandara Rao* (2), referred to.

Second appeal from the decree of J. Coldstream, Esquire, District Judge, Delhi, dated the 27th February 1922, affirming that of Lala Dwarka Parshad, Subordinate Judge, 2nd class, Delhi, dated the 26th July 1921, dismissing the claim.

SLEEM, for Appellant.

GHULAM MUHAMMAD, for Respondents.

(1) (1921) I. L. R. 48 Cal. 499, 507, 508 (P.C.).

(2) (1922) I. L. R. 45 Mad. 320, 331 (P.C.).

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JUDGMENT.

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FORDE J.—The facts out of which this appeal has arisen are shortly as follows :—

In 1913 Muhammad Umar sued the plaintiff in the present suit. Sahibzadi Begum, for his share in certain land, the property of one *Mussammat* Abadi Begum, deceased. In that suit Muhammad Umar's brothers and sisters were joined as parties. The result of that suit was that Muhammad Umar was given a decree for 2/27th of *Mussammat* Abadi Begum's landed property and the Court held that Sahibzadi Begum was entitled to a 2/3rds interest in that property.

Mussammat Sahibzadi Begum brought the present suit for partition of a 2/3rd share in certain houses also forming part of the estate of the above-named deceased of which Muhammad Umar had taken possession, and she has named Muhammad Umar and the other parties to the previous litigation as defendants. Muhammad Umar now raises the defence *inter alia*, that *Mussammat* Sahibzadi Begum is not entitled to a 2/3rds interest in these houses, as there are two other persons, namely, *Mussammat* Nazir Begum and *Mussammat* Wazir Begum, who, under Muhammadan Law, are the sole heirs of that lady. If this plea had been raised in Muhammad Umar's original suit he would have been defeated, and, in my opinion, in view of the fact that in that previous litigation neither party referred to these two women as having a claim to the succession to *Mussammat* Abadi Begum's property, neither is now entitled to raise that issue in the present proceedings.

The trial Court held that so far as the plea of *res judicata* is concerned that plea could not be sustained under the provisions of section 11 of the Civil

Procedure Code as the present suit was not triable by the Munsif who tried the previous suit.

The lower appellate Court has held that the question as to the right of succession to *Mussammat* Abadi Begum's estate is not *res judicata* but on the question as to the competency of the first Court to try this suit it has come to no decision.

This latter question, however, in my opinion need not be considered in view of the decision I have arrived at on the other point. The plea of *res judicata* is not confined to the provisions of section 11 of the Civil Procedure Code, but may be invoked under general principles of law. For this proposition I would refer to a decision of their Lordships of the Privy Council in *Hook v. Administrator-General of Bengal* (1) and to the concluding passages in the judgment of Lord Buckmaster in *Ramachandara Rao v. A. N. S. Ramachandara Rao* (2).

Had the question of the superior claim of *Mussammat* Nasir Begum and *Mussammat* Wazir Begum been raised in the previous suit Muhammad Umar could not have succeeded in establishing his claim to a portion of *Mussammat* Abadi Begum's property. Having acquired an interest in some of the property upon a suppression of the fact that there were other persons with a superior right to it, he cannot now use that fact to defeat a claim for partition of another portion of the same estate. As between *Mussammat* Sahabzadi Begum and Muhammad Umar the question of the right of succession to the property of *Mussammat* Abadi Begum cannot, in my opinion, be re-tried, no matter what new evidence or new arguments the parties may now have available.

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FFORDE J:

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 CAMPBELL J.

I would, therefore, accept the appeal and remand the case to the trial Court under Order XLI, rule 23 for trial of issues 1, 3, 4 and 5. The Court fee on the memorandum of appeal must be refunded.

CAMPBELL J.—I concur. The houses now in suit did not form part of the subject matter of the previous suit of 1913, since, apparently, after the death of *Mussammat* Abadi Begum, her brother's daughter (the present plaintiff) took possession of the land and the defendants, her sister's children, of the houses. Hence Muhammad Umar's claim in 1913 against the present plaintiff actually was for a share in the land only.

At the same time the question of the respective rights of the present parties as heirs of *Mussammat* Abadi Begum was clearly and directly in issue in that former suit. The issue framed and tried was whether according to Muhammadan Law defendant No. 1 (*i.e.*, the present plaintiff) alone is entitled to succeed to *Mussammat* Abadi Begum and in the trial both parties deliberately ignored the existence of *Mussammat* Nasir Begum and *Mussammat* Wazir Begum.

I agree with my learned brother that under general principles of law the previous decision should be held to be a final decision, as between these two parties of their rights in the estate of *Mussammat* Abadi Begum and that one of them should not now be permitted to question it on the strength of a fact which he knowingly suppressed at the time of the former trial.

A. N. C.

Appeal accepted, case remanded.