APPELLATE CIVIL.

Before Shadi Lal C. J. and Hilton J.

PARSHOTAM SINGH AND ANOTHER (DEFENDANTS) Appellants

versus

BALWANT SINGH AND OTHERS (PLAINTIFFS)
RAM SINGH (DEFENDANT) } Respondents.

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May 27.

Civil Appeal No. 819 of 1925.

Indian Limitation Act, IX of 1908, articles 120, 129, 131, 144—Suit to fix maintenance and to give it in terms of landed property—Civil Procedure Code, Act V of 1908, section 11, Explanation IV—Res judicata—*different causes of action—application of the rule of* constructive res judicata *—where plaintiff* was not bound *to set up present claim in previous suit.*

The previous suit was one in ejectment, the plaintiff claiming to be the owner of a specified plot of land, assessed to Rs. 16 as land revenue, alleged to have been given to him in lieu of maintenance by defendant, who had subsequently dispossessed him. In the present case, the plaintiff sought to prove his right to maintenance, and, in the event of his establishing that right, claimed, in lieu of maintenance, a plot of land liable to the payment of Rs. 14 as land revenue, in accordance with the rule of custom which prevailed in the family to which the parties belonged.

Held, that the suit was governed by article 120 or article 144 of the Indian Limitation Act, and not by article 129 or article 131.

Dost Muhammad Khan v. *Sohan Singh* (1), referred to.

Held also, that the fact that the cause of action in the present suit was wholly different from that in the former suit did not in itself take the present claim out of the purview of the doctrine of *res judicata*.

Held further, that the doctrine of *constructive res judicata*, which finds expression in explanation IV of section 11 of the Civil Procedure Code, not only declares that a matter, which might and ought to have been made a ground of attack

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or defence, shall be deemed to have been a matter directly and substantially in issue, but also implies that the matter shall be deemed to have been decided against the party who omitted to raise it. In other words, the result of the omission is that there would be, not only a constructive issue in the suit, but also a constructive decision on that issue, against the party failing to set it up.

But, that, as it could not be said that the plaintiff *was bound* to put forward his present claim as a ground of attack in the former suit, the second suit was not barred by the rule of *res judicata*.

Kameswar Parshad v. *Rajkumari Ruttun Koer* (1), *Mahomed Ibrahim* v. *Sheikh Hamja* (2), *Zamorin of Calicut* v. *Narayanan Mussad* (3), and *Kutti Ali* v. *Chindan* (4), referred to.

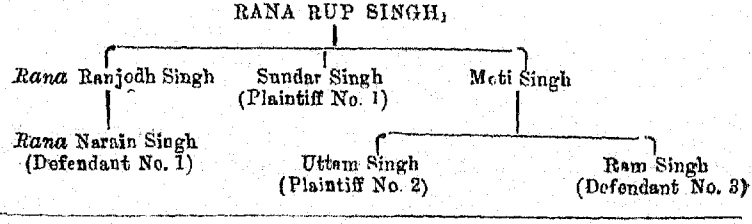
Second appeal from the decree of Dewan *Somnath, Additional Judge, Kangra and Hoshiarpur, dated the 5th January, 1925, affirming that of* Chaudhri *Chhajju Ram, Subordinate Judge, 4th class, Kangra, dated the 18th June, 1923, awarding the plaintiffs possession by partition of the land, etc.*

MEHR CHAND MAHAJAN, DES RAJ and BADRI DAS, for Appellants.

JAGAN NATH AGGARWAL and CHANDRA GUPTA, for Respondents.

SHADI LAL C.J.

SHADI LAL C.J.—The parties to this appeal are the descendants of *Rana* Rup Singh of Abhrol in the District of Kangra, and their relationship *inter se* appears from the following pedigree table :—



(1) (1892) 19 I. A. 234.
(2) (1911) I. L. R. 35 Bom. 507.
(3) (1899) I. L. R. 22 Mad. 323.
(4) (1900) I. L. R. 23 Mad. 629.

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On the death of *Rana* Rup Singh, his entire estate devolved upon his eldest son *Rana* Ranjodh Singh. It is common ground that, under the rule of primogeniture, which governs the succession to the landed estate in the family, the eldest son inherits the estate of his father, as well as the *jagir*; and that the junior members are entitled only to maintenance. The learned District Judge finds that, according to the custom prevailing in the family, each of the younger members receives, in lieu of maintenance, a plot of land assessed to the payment of Rs. 14 as land revenue; and he has accordingly granted the plaintiffs a decree declaring that, on a partition of the estate by the Collector, they shall get possession of a plot of land liable to pay Rs. 21 as land revenue; that is to say, Sundar Singh getting land equivalent to Rs. 14, and his nephew, Uttam Singh, land worth Rs. 7, in terms of land revenue.

On behalf of *Rana* Parshotam Singh, the legal representative of the contesting defendant, *Rana* Narain Singh, who died during the pendency of the appeal, Mr. Mehr Chand *Mahajan* argues that the cause of action to recover maintenance arose on the death of *Rana* Rup Singh, which event took place some time in 1887; and that the action, which was brought in 1922, was consequently barred by limitation. The learned counsel on both sides admit that the suit is governed neither by article 129 of the first schedule to the Indian Limitation Act, which is restricted in its operation to a suit for maintenance in which the right is based upon Hindu Law, and not upon custom as in the present case, nor by article 131, which, according to the judgment in *Dost Muhammad Khan and others* v. *Sohan Singh and others* (1), is

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confined to a suit in which the plaintiff seeks simply to establish his right to maintenance, but does not ask for consequential relief. It is conceded that the rule of limitation applicable to the claim is furnished either by article 120 or by article 144, and that the choice between the two provisions of the law must depend upon the question whether the suit is to be treated as one for a declaration, or for possession. Upon the evidence produced by the parties the learned District Judge holds that *Rana* Ranjodh Singh, and after him *Rana* Narain Singh, had been giving grain to the plaintiffs by way of maintenance, and that the allowance was stopped only two years before the institution of the suit. In view of this finding, which cannot be assailed in second appeal, the suit is clearly within time, whether it is governed by article 120 or article 144.

The only other question of law which has been urged by Mr. Mehr Chand *Mahajan* is that the claim of Sundar Singh is barred by the rule of *res judicata*. It appears that in 1912 Sundar Singh brought an action for the recovery of a specific plot of land situated in Tika Dhati on the allegation that *Rana* Ranjodh Singh had given him that land in lieu of maintenance, and had subsequently dispossessed him. The suit was dismissed because Narain Singh, by whose oath the plaintiff had agreed to be bound, declared that the land then in dispute had not been given to the latter. It is contended that Sundar Singh was bound to put forward in that suit an alternative claim that, in the event of his failure to prove the allegation about the allotment of the land to him, the Court should give him a decree for the possession of that very plot in lieu of maintenance. Now, Explanation IV to section 11 of the Civil Procedure Code, which is

invoked by the learned counsel, enacts that "any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It will be observed that the doctrine of *constructive res judicata*, which finds expression in this explanation, not only declares that a matter which might and ought to have been made a ground of attack or defence shall be deemed to have been a matter directly and substantially in issue, but also implies that the matter shall be deemed to have been decided against the party who omitted to raise it. In other words, the result of the omission is that there would be not only a constructive issue in the suit, but also a constructive decision on that issue, against the party failing to set it up.

It is, however, obvious that the former suit was based upon the allegation of possession and dispossession in respect of a specified plot of land of which the plaintiff claimed to be the owner: and it is conceded that the land revenue assessed on that land was Rs. 16; while, according to the custom relied upon by him, he could get a plot of land corresponding to only Rs. 14 in land revenue. The cause of action in the present suit is wholly different from that in the former suit, but that fact alone does not take the case out of the purview of the doctrine of *res judicata*. In the former suit the plaintiff could, in the alternative, ask the Court to fix maintenance, and to give him maintenance in terms of landed property. The claim now put forward might have been made a ground of attack in the previous suit, but the question is whether it ought to have been made a ground of attack. My answer to this question is in the negative. The only right claimed in the former suit was the

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recovery of certain land from a trespasser, and I do not think that it was necessary for a complete and final determination of that right that the plaintiff should have asked the Court to adjudicate upon his right to maintenance and to allot to him a plot equivalent to Rs. 14 in land revenue.

The learned counsel for the parties have invited our attention to several decided cases, but a perusal of the reports shows that those cases proceeded upon their own peculiar facts, and afford little or no guidance in the determination of the question before us. As observed by their Lordships of the Privy Council in *Kameswar Parshad* v. *Rajkumari Ruttun Koer*, *etc.* (1), the question whether any matter ought to have been made a ground of attack or defence in a previous suit must depend upon the facts of each case.

The judgment in *Mahomed Ibrahim* v. *Sheikh Hamja* (2) has, however, a bearing upon the present case. In that case, the plaintiff, claiming to be the mortgagor of certain land, sued the defendant for redemption. The plaintiff failed to prove the mortgage, and the suit was dismissed. He then sued the defendant for possession of the same land, claiming to be the owner thereof. It was held that the second suit was not barred by the rule of *res judicata*. To the same category belongs the case of a person who, after the dismissal of his first suit for certain land on an alleged lease, brings a second suit for the recovery of the same land on the strength of his general title. It has been repeatedly held that the second suit is not barred as *res judicata—vide inter alia*, *Zamorin of Calicut* v. *Narayanan Mussad*, *etc.* (3) and *Kutti Ali* v. *Chindan*, *etc.* (4).

(1) (1892) 19 I. A. 234.
(2) (1911) I. L. R. 35 Bom. 507.
(3) (1899) I. L. R. 22 Mad. 323.
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The principle underlying these decisions is applicable to the case before us. The matter in this suit is essentially different from that in the former suit. The previous suit was one in ejectment, the plaintiff claiming to be the owner of the property; and the question was whether the defendant was a trespasser. In the present case, the plaintiff seeks to prove his right to maintenance, and, in the event of his establishing that right, he wants in lieu of maintenance, a plot of land liable to the payment of Rs. 14 as land revenue. It cannot be reasonably said that the plaintiff was bound to put forward this claim as a ground of attack in the former suit.

SHADI LAL C.J.

Holding, as I do, that neither the plea of limitation, nor the bar of *res judicata*, has been established, I would affirm the decree of the District Judge, and dismiss the appeal with costs.

HILTON J.—I agree.

HILTON J.

N. F. E.

Appeal dismissed.