APPELLATE CIVIL.

Before Skemp J.

1937

Jan. 13.

MUSSAMMAT JIO (DEFENDANT) Appellant,

versus

NABI BAKHSH (PLAINTIFF) Respondent.

Civil Appeal No. 190 of 1936.

Res Judicata — *Civil Procedure Code, Act V of 1908, s. 11, Expl. IV — Suit relating to a matter which might have been made a ground of attack in former suit.*

On the death of F. his land passed by mutation to his son (the plaintiff) and his widow (the defendant) in equal shares. The plaintiff instituted a suit against the defendant, his step-mother, for a declaration that he was the exclusive owner of the land as the defendant had been divorced by F. many years before his death. The trial Court held that the divorce had not been proved and dismissed the suit. Thereupon the plaintiff brought another suit against the defendant for a declaration that she was entitled only to one fifth share in the land left by F. in lieu of maintenance and not to one half.

Held, that the second suit was barred by the provisions of Expl. IV of s. 11 of the Code of Civil Procedure.

Kameswar Parsad v. Rajkumari Ruttan Koer (1), *Imam Khan v. Ayub Khan* (2), and *Guddappa v. Tirkappa* (3), relied upon.

Gangaprasad v. Kodulal (4), not followed.

Ningaya v. Madivalava (5), distinguished.

Payana Reena Saminathan v. Pana Lana Palaniappa (6), referred to.

First appeal from the order of Mr. G. S. Mongia, Additional District Judge, Lahore, dated 13th May, 1936, setting aside the decree of M. Mohammad Ibrahim, Subordinate Judge, 1st Class, Kasur, dated 2nd December, 1935, and remanding the case.

(1) I. L. R. (1893) 20 Cal. 79 (P. C.).
(2) I. L. R. (1897) 19 All. 517.
(3) I. L. R. (1901) 25 Bom. 189.
(4) 1927 A. I. R. (Nag.) 322.
(5)1931 A. I. R. (Bom.) 187.
(6) (1913) L. R. 41 I. A. 142.

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QABUL CHAND, for MOHAMMAD MONIR, for Appellant.

A. R. KAPUR, for Respondent.

SKEMP J.—The facts which have led to the present second appeal are not in dispute. The plaintiff Nabi Bakhsh is the son of Farid, deceased, while the defendant *Mussammat* Jio is his stepmother. On the death of Farid his land passed by mutation to Nabi Bakhsh and *Mussammat* Jio in equal shares. The plaintiff instituted a suit against *Mussammat* Jio for a declaration that he was the exclusive owner of the land, on the allegation that *Mussammat* Jio had been divorced by Farid many years before his death and had nothing to do with his property. The trial Court held that the divorce was not proved and dismissed the plaintiff's suit; and this decree was upheld on appeal.

Now Nabi Bakhsh has sued again for a declaration that *Mussammat* Jio is only entitled to one-fifth share in Farid's land in lieu of maintenance as his widow and not to one-half. The trial Judge dismissed the suit relying on section 11 and Order II, Rule 2 of the Code of Civil Procedure. On appeal the learned Additional District Judge took the contrary view and held that the present suit was not barred. He remanded the case to the trial Court for a decision on the merits.

Against this decision the present second appeal has been lodged, the sole point being whether the second suit is barred.

After consideration of the learned District Judge's judgment and the authorities cited before me I am of opinion that it is so barred. The matter is governed by Explanation IV to section 11, Civil Procedure Code, which states that any matter which

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might and ought to have been made 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. The leading case is *Kameswar Parsad v. Rajkumari Ruttan Koer* (1), in the course of which their Lordships of the Privy Council said " that it ' might ' have been made a ground of attack is clear. That it ' ought ' to have been, appears to be their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word ' ought ' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Ran Bahadur, and it appears to their Lordships that the matter ' ought ' to have been made a ground of attack in the former suit, and therefore that it should be ' deemed to have been a matter directly and substantially in issue ' in the former suit, and is *res judicata*."

This passage or part of it has been quoted in most of the successive rulings. In *Imam Khan v. Ayub Khan* (2) the plaintiff sued for possession of a property as owner. He failed and then brought a suit for possession as mortgagee. The learned Judges were of opinion " that the claim in the alternative to hold as mortgagee not merely ' might ' but ' ought ' to have been added to the prayer in the former suit as a ground of attack on the defendant."

In *Guddappa v. Tirkappa* (3) the plaintiffs in the first suit claimed land on the ground that they were sole surviving members of a joint family. The suit was dismissed. They were deprived of possession and

(1) I.L.R. (1893) 20 Cal. 79 (P. C.). (2) I.L.R. (1897) 19 All. 517.
(3) I. L. R. (1901) 25 Bom. 189.

then brought a suit for recovery of the same land alleging a title by heirship as distinct from survivorship. The leading judgment was written by Sir Lawrence Jenkins, who after referring to *Kameswar Parshad v. Rajkumari Ruttan Koer* (1) said that " the test, therefore, proposed whereby to determine whether it ' ought ' to have been matter of attack is this : are the matters so dissimilar that their union might lead to confusion? To my mind there is in this case but one answer to that question; that absolutely no confusion would have arisen had the plaintiff in the former suit pleaded in the alternative the title he now sets up."

It is clear that if Nabi Bakhsh had included in his first suit a claim in the alternative that even if the divorce of *Mussammat* Jio was not proved she was not entitled to so much as half the land for maintenance, there would have been no confusion whatever. The issues and the evidence on this point would have been entirely separate. This really governs the case.

The learned District Judge and the respondent relied on *Gangaprasad v. Kodulal* (2) and *Ningaya v. Madivalava* (3). The Nagpur ruling only consists of a few sentences and does not state the facts. It merely enunciates the rule that a person is not bound to sue on an alternative cause of action and failure to do so in the former suit does not bar a subsequent suit. In the Bombay ruling the plaintiff sued to recover possession of the whole of the property on the ground that she had purchased it in 1907, that she was the exclusive owner of the property and that her sister, the defendant, had no interest therein. The defence was that the mother was the owner of the property,

(1) I.L.R. (1893) 20 Cal. 79 (P. C.) (2) 1927 A. I. R. (Nag.) 322.
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that the mother and the defendant had purchased another plot which was exchanged for the land in suit, that the exchange was effected by the defendant herself and that the plaintiff had no share therein. The trial Judge held that the plaintiff's purchase was not proved, but granted her possession of half the share on the ground that the property belonged to the mother. That decision was reversed in appeal on the ground that the plaintiff failed on the case set out in the plaint, and could not set up any other claim which was inconsistent with it. The second suit was brought by the plaintiff on the ground that the mother was the owner of the property, that the plaintiff and the defendant were her heirs, that they had exchanged the land for the plaint land and therefore the plaintiff was entitled to recover half the share in the plaint land.

The Bench held that the second suit was not barred. Patkar J. said " where the introduction of a ground of attack in the previous suit would have been incongruous to the subject-matter of the previous suit, it could not be said that the matter ought to have been set up as a ground of attack in the previous suit." Baker J. said that the two alternative cases would have been mutually destructive and the evidence in support of them contradictory. I think this case may be distinguished on the facts from the present one because, as already remarked, the two issues whether *Mussammat* Jio had been divorced and, if not divorced, what share of the land she is entitled to for maintenance, are entirely distinct and separate issues.

The plaintiff's learned counsel also referred to *Payana Reena Saminathan v. Pana Lana Palaniappa* (1), a ruling not on section 11 but on section 34 of the

(1) (1913) L. R. 41 I. A. 142.

Ceylon Civil Procedure Code, which is in the same terms as Order II, Rule 2, Civil Procedure Code. It was there held that where plaintiffs had owing to a technicality failed in a suit on promissory notes they might base their claim on the original cause of action on which the pronotes were based. Their Lordships said " So long as the notes were outstanding there was no right of action otherwise than upon the notes." It was therefore impossible in their Lordships' opinion to hold that the claim for the amount due was the same cause of action as the claim upon the notes and ought to have been included in the prior action.

In my judgment the ground of action now taken by the plaintiff ought to have been made a ground of attack in the previous suit and the present suit is barred.

I accept the appeal, set aside the order of remand passed by the learned Additional District Judge and restore the order of the trial Judge dismissing the suit. The plaintiff is to bear the defendant's costs throughout.

P. S.

Appeal accepted.