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For these reasons we hold that in cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is, as in the present case, between her and a half brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.

The order, therefore, under appeal must be reversed and the application of the appellant for a certificate of heirship under Regulation VIII of 1827 must be granted. As the point of Hindu law which is settled by this judgment was open to doubt, we pass no order as to the costs in this Court or the Court below.

Order reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

ABDULLAKHAN VALAD USMANKHAN ADHIKARI (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHANMIA VALAD ARABKHAN ADHIKARI (ORIGINAL DEFENDANT), RESPONDENT.*

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Civil Procedure Code (*Act XIV of* 1882), *sec.* 13, *explanation. II*—Res judicata *—Property not included in the former suit—Right as heir decided in the former suit with respect to other property—The decision does not bar the second suit.*

K. brought a suit against A. and others to recover some property as heir of one S., praying for a partition of the properties specified in the plaint and for allotment to him of S.'s share therein. A. denied K.'s heirship and asserted himself to be heir of S. It was decided that A. was the heir of S. and the suit was dismissed.

A. then brought another suit against K. to establish his right as S.'s heir to property not included in the plaint in the first suit. The lower appellate Court negatived the claim upon the ground that as A. failed to make the omission by K. to include the property in dispute in the previous suit for partition a

* Second Appeal No. 509 of 1907.

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ground of defence, A.'s right to the property was in the second suit barred under Explanation II to section 13 of the Code of Civil Procedure (Act XIV of 1882).

On appeal to the High Court:

Held, that A.'s right to maintain the suit was not barred by *res judicata*.

Explanation II to section 13 of the Civil Procedure Code (Act XIV of 1882) must be read in conjunction with and as part and parcel of the leading provisions of the section itself. According to those provisions, several conditions are necessary to constitute a matter *res judicata*. Two of these conditions are: (1) that the matter must have been in the former suit directly and substantially in issue; and (2) that it must have been heard and finally decided in that suit.

The explanation does no more than lay down that if a matter, which might and ought to have been made a ground of defence in the former suit, is not made such a ground, it shall be dealt with as falling within the first of the above-mentioned conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence. But to constitute *res judicata*, a second condition is necessary—it must have been finally decided and if the former suit went off on a preliminary ground not calling for adjudication on other grounds of defences whether raised or not, those grounds remain undecided.

The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit, as must be given to it if it had been made a ground of defence in the former suit.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, with Appellate Powers, at Thána, reversing the decree passed by S. G. Kharkar, Subordinate Judge of Pen.

One Salekhan was the owner of an *adhikari vatan* allowance of Rs. 79-3-10 payable annually from the treasury at Pen. He died in 1899.

On the 1st July 1901, Khanmiya (defendant) brought a suit (No. 265 of 1901) to recover by partition certain property from defendants in that suit Abdullakhan (plaintiff) was defendant No. 7 in that suit.

In that suit it was contended by Abdullakhan that he and not Khanmiya was the heir to Salekhan. One of the issues raised in that suit was: "Whether plaintiff (Khanmiya) is Salekhan's heir; and, if so, what is his share in the property in dispute." The finding upon this issue was that Abdullakhan was the heir to Salekhan. As a result, the suit was dismissed.

On the 6th June 1904 Abdullakhan brought the present suit against Khanmiya, alleging himself to be Salekhan's heir and claiming to recover from defendant the allowance for three years since 1901, which belonged to Salekhan. The claim to this allowance was not the subject-matter in dispute in the former suit.

The Subordinate Judge decreed the plaintiff's claim holding that the defendant was barred from disputing the plaintiff's claim by the decision in Suit No. 265 of 1901.

This decision was on appeal reversed and the suit dismissed with costs. The lower appellate Court held that the plaintiff was precluded from maintaining the suit by Explanation II to section 13 of the Code of Civil Procedure Code by the decree in Suit No. 265 of 1901.

The plaintiff appealed to the High Court.

B. V. Vidwans, for the appellant :—The first suit against the appellant was in ejectment and not for partition: so he was not under any duty to raise the plea that all the property was not brought into hotchpot. Such a plea would have been inconsistent with his claim that he was the sole heir and not the respondent.

Assuming that he might and ought to have raised the plea and failed to do so, it would not bar the present suit. The rule is that a defendant, who omits to raise any ground in defence of his possession and allow the plaintiff to win, cannot afterwards question the title of the plaintiff in a fresh suit upon any ground which he might have urged before: *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar*[1]. Here it was the defendant and not the plaintiff that won the suit.

Again, even if the defendant had raised the plea and that on that point the Court had decided against him, the matter would not have been *res judicata*. For it was sufficient to dismiss the suit that the plaintiff was not the heir: *Prabhakarbhat* v. *Vishwambhar Pandit*[2].

(1) (1868) 11 Moo. I. A. 50 at p. 77. (2) (1884) P. J. p. 23.

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J. R. Gharpure, for the respondent :—The first suit clearly was for a partition of whatever property Salekhan had: but the plaintiff who was defendant there did not set up the plea which he ought to have raised. See *Maktum* v. *Imam*[1]; *Damodardas Maneklal* v. *Uttamram Maneklal*[2]; *Shyama Charan Banerji* v. *Mrinmayi Debi*[3]; *Gopal Lal* v. *Benarasi Pershad Chowdhry*[4]; *Vinayak* v. *Dattatraya*[5].

CHANDVARKAR, J.—The lower appellate Court has found upon the evidence that the appellant, Abdullakhan valad Usmankhan, is the heir of the deceased Salekhan, and that as such he would have been entitled to the property in dispute, were it not that his right is barred on the ground of *res judicata*.

That ground is based upon suit No. 265 of 1901, brought by the first respondent, Khanmia, claiming as the heir of the deceased Salekhan, against several persons, of whom the appellant was defendant No. 7 and the second respondent was defendant No. 13. The first respondent prayed in that suit for partition of the properties specified in his plaint and for allotment to him of Salekhan's share therein.

The property now in dispute was not included in that plaint.

The appellant in his defence denied the first respondent's heirship and asserted himself to be Salekhan's heir.

The Subordinate Judge having raised several issues, of which one was whether the first respondent or the appellant was Salekhan's heir, found upon the evidence in favour of the latter and against the former on that one issue and dismissed the suit, holding it unnecessary in consequence of that finding to decide the other issues.

The appellant has brought the suit, out of which this second appeal arises, to establish his right to the property in dispute as Salekhan's heir.

The lower Appellate Court has negatived the claim upon the ground that as the appellant failed to make the omission by the first respondent to include the property in dispute in the previous suit for partition a ground of defence, his (appellant's) right to

(1) (1873) 10 B. H. C. R. 223.
(2) (1892) 17 Bom. 271.
(3) (1902) 31 Cal. 79.
(4) (1904) 31 Cal. 428.
(5) (1902) 26 Bom. 661 at p. 667.

the property is in the present suit barred under Explanation II to section 13 of the Code of Civil Procedure.

That explanation must be read in conjunction with and as part and parcel of the leading provisions of the section itself. According to those provisions, several conditions are necessary to constitute a matter *res judicata*. Two of those conditions are: (1) that the matter must have been in the former suit directly and substantially in issue; and (2) that it must have been heard and finally decided in that suit.

Explanation II does no more than lay down that if a matter, which might and ought to have been made a ground of defence in the former suit, is not made such a ground, it shall be dealt with as falling within the first of the above-mentioned conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence.

It can hardly be disputed that if it had been made a ground of defence and the Court in the former suit had declined to decide the matter but disposed of the suit on some other ground sufficient for its final adjudication, the said matter cannot be *res judicata*.

Why should the omission of the matter among the grounds of defence have a wider effect than that and become *res judicata?* Explanation II does not attribute to that omission any such effect.

For instance, suppose A, as heir of B, sues C for partition of Whiteacre. C denies A's heirship and claims to be himself the heir, and further pleads that, if the Court should hold A to be the heir, the suit for partition is bad because A has not included in his plaint another property—Blackacre—in which B had a share. The Court raises two issues:—(1) whether A or C is B's heir; (2) whether the suit is bad by reason of A's omission to include Blackacre in his claim for partition. The Court finds A is not but C is B's heir, and declines to decide the second issue because, in consequence of the finding on the first issue, it does not arise. In such a case there being no final decision on the second issue, the matter covered by it is not *res judicata*.

Now, if C had omitted to make that matter a ground of defence, under Explanation II, it would have become a matter directly

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and substantially in issue as if it had been made such a ground. But then to constitute *res judicata*, a second condition is necessary —it must have been finally decided. And if the former suit went off on a preliminary ground, not calling for adjudication on other grounds of defence, whether raised or not, those grounds remain undecided.

And that is exactly what happened in suit No. 265 of 1901 between the present parties. The first respondent was found not to be Salekhan's heir and therefore no suit for partition could lie at his instance. The Court declined to decide other issues; and even if it had decided them, the findings could not be *res judicata*, having regard to *Anusuyabai* v. *Sakharam Pandurang*(1); *Ghela Ichharam* v. *Sankalchand Jetha*(2); *Shib Charan Lal* v. *Raghu Nath*(3); and *Rango* v. *Mudiyeppa*(4).

The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit as must be given to it if it had been made a ground of defence in the former suit. All that was decided in suit No. 265 was that the first respondent was not Salekhan's heir. From that preliminary finding it followed that the first respondent had no right to claim partition at all. The question whether the suit for partition was good in other respects did not arise, and as to them, therefore, the actual decision of the suit on the preliminary point could not constitute them *res judicata*, for the purposes of the present suit.

For these reasons we reverse the decree and restore that of the Subordinate Judge with costs in this and in the lower appellate Court upon the respondents.

Mr. Gharpure for respondent No. 2 urges that as his client claims as mortgagee under respondent No. 1 our decree should be without prejudice to his rights in that respect. As no question arises here as between the two respondents we decline to to accede to the prayer.

Decree reversed.

R. R.

(1) (1883) 7 Bom. 464.
(2) (1893) 18 Bom. 597.
(3) (1895) 17 All. 174.
(4) (1898) 23 Bom 396 at p. 402.