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has the power to decide the question of title also if that is necessary for the exercise of that power, for the two powers are in that case inter-dependent, and if the latter is denied, the former becomes ineffective and the Act unworkable. Whether the Legislature has taken away by the Act the remedy by way of a suit is another question not arising now.

But in our opinion, it would be highly desirable that these claims to apportionment involving questions of title should be decided by the High Court and not the Tribunal of Appeal, as it is obvious that very complicated questions may arise of law and fact upon which it would be more desirable to have the judgment of the High Court.

This appeal will accordingly be heard further.

[The appeal was heard further with the result that the decree passed by the lower Court was varied.]

Decree varied accordingly.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

RUKHMINI KOM MAHADU LINGADE AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DHONDO MAHADU LINGADE (ORIGINAL PLAINTIFF), RESPONDENT. *

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Civil Procedure Code (Act V of 1908), section 11—Res judicata—*Co-plaintiff*, res judicata *as between—Civil Procedure Code (Act XIV of 1882), section 26—Joinder of parties.*

The plaintiff D and his step-mother R (defendant) brought a suit against C to recover possession of certain ornaments which formed part of the estate of M, the father of D and husband of R. It was held by the Court of first instance that R was entitled to the ornaments, because they were her *stridhan*; but the appellate Court held that she was entitled to them not because they were her *stridhan*, but because she was the absolute owner of the property. D then sued R for a declaration that he, as son and heir to M, was entitled to hold the decree. The defendant in reply contended *inter alia* that the suit was barred by *res judicata* :—

Held, that the bar of *res judicata* did not apply, inasmuch as there was no final adjudication as between R and D, and in the first suit it was a matter of no

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consequence to the defendant therein for the purposes of the relief to be given against him whether R succeeded or whether D succeeded.

A finding to become *res judicata* as between co-plaintiffs must have been essential for the purpose of giving relief against the defendants.

Ramchandra Narayan v. *Narayan Mahadev*,(1) followed.

The Court ought not to hold a point to be *res judicata* unless it is clear from the pleadings and the findings in the previous suit. No Court ought to infer *res judicata* by mere arguments from a judgment in a previous suit.

Attorney-General for Trinidad and Tobago v. *Eriche*,(2) followed.

SECOND appeal from the decision of G. N. Kelkar, First Class Subordinate Judge at Belgaum with appellate powers, confirming the decree passed by E. Reuben, Subordinate Judge at Belgaum.

Suit for declaration and injunction.

The property in dispute, which consisted of ornaments, belonged originally to one Mahadu. He died in 1900, leaving him surviving his widow Rukhmini (defendant) and a son Dhondo (plaintiff) by a predeceased wife, Bhima.

In 1905, Dhondo and Rukhmini brought a suit against one Chintu to recover from him the ornaments which belonged to the estate of Mahadu. The Court of first instance held that Rukhmini was entitled to the ornaments which were her *stridhan*. In the lower Court of appeal, Dhondo was left out of consideration on the ground that there was no proof on the record that he was the legitimate son of Mahadu. The Court then framed the following issues for decision (1) whether the lower Court erred in deciding the suit on grounds not raised in the pleadings? and (2) whether the ornaments in suit were the self-acquired property of plaintiff's husband, Mahadu? Both these issues were found in the affirmative. The Court remarked as follows:—

"The plaint is clearly to the effect that the ornaments in dispute were the self-acquired property of plaintiff's husband. The word *stridhan* is nowhere mentioned. The lower Court in finding them to be the plaintiff's *stridhan* went beyond the pleadings and the evidence."

(1) (1886) 11 Bom. 216. (2) [1893] A. C. 518.

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In 1909 Dhondo filed the present suit against Rukhmini praying for a declaration that he was the owner of the decree in the first suit and for an injunction prohibiting Rukhmini from recovering the amount of the decree.

The defendant contended *inter alia* that the suit was barred by *res judicata*.

Both lower Courts held that the bar of *res judicata* did not apply and decreed the plaintiff's claim.

The defendant appealed.

Jayakar with *C. A. Rele* for the appellants :—We submit that Dhondo's claim with reference to the ornaments is *res judicata*. He and Rukhmini were co-plaintiffs in the former suit, where the prayer was that the ornaments be declared to belong to both or either of them. It was held that Rukhmini alone was entitled to the ornaments. Dhondo's claim so far must be deemed to have been refused. See section 26 of the Civil Procedure Code (Act XIV of 1882); *Ramchandra Narayan* v. *Narayan Mahadev* [1] and *Cottingham* v. *Earl of Shrewsbury* [2].

Nilkanth Atmaram for the respondent :—Our claim is not barred by *res judicata*. In the first suit no distinct issue was raised as to the ownership of ornaments ; and an adjudication upon it was not necessary to give relief against Chinto.

CHANDAVARKAR, J. :—The facts of this case are shortly as follows. The present plaintiff Dhondo, and the present defendant No. 1, Rukhmini, filed a suit No. 77 of 1905, as co-plaintiffs, against one Chinto to recover possession of certain ornaments. In the plaint it was alleged that the ornaments belonged to the estate of Mahadu, father of Dhondo and husband of Rukhmini ; and the co-plaintiffs asked for a declaration that the property belonged to such one of them, either Rukhmini or Dhondo, as might be held entitled by the Court.

The Court of first instance, who tried that suit, held that the property belonged to Rukhmini, because in the opinion of that Court they were her *stridhan* ornaments.

(1) (1886) 11 Bom. 216. (2) (1843) 3 Hare. 627.

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There was an appeal by Chinto, and the appellate Court confirmed the decree on the ground that the ornaments were Rukhmini's, because the second plaintiff in that suit, namely, Dhondo, had not been proved by the evidence upon the record to be the son of Mahadu. Therefore, there was a decree in that suit that the ornaments belonged to Rukhmini, the appellant before us.

In the present suit, which has led to this second appeal, Dhondo, respondent before us, alleges that the ornaments, which formed the subject matter of the previous suit, and certain other property, not covered by the decree in that suit, belonged to the estate of Mahadu; that he is his legitimate son, and, in consequence, entitled to both the ornaments and the other property. Both the Courts below have awarded his claim and held that he is entitled not only to the immoveable property which was not covered by the plaint in the previous suit, but also to the ornaments which formed the subject matter of that suit.

The decree of the Court below in the present suit is assailed in second appeal before us; first, upon the ground that the claim of the plaintiff with reference to the ornaments is *res judicata*; and the learned Counsel for the appellant, Rukhmini, relies upon section 26 of the Code of Civil Procedure which applied to this litigation, having been in force at the time the plaint was filed, and also upon the principle of certain decisions of this Court, the leading decision being in the case of *Ramchandra Narayan* v. *Narayan Mahadev*[1].

Section 26 of the old Code of Civil Procedure provided:—

"All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment."

It is contended by Mr. Jayakar for the appellant, that when two co-plaintiffs bring forward a claim, and ask for a decree in favour of either one or other of them in the alternative, and

(1) (1886) 11 Bom. 216.

the Court grants relief to one of the plaintiffs, the finding that that plaintiff is entitled to the relief on the ground of the title proved becomes *res judicata* in any subsequent suit between the said co-plaintiffs for the same subject matter. In support of that contention reliance is placed upon the principle of the decision to which we have already referred, where it was held by this Court that " where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants." But as was said there " without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group."

It is contended that the same principle applies as between co-plaintiffs. Assuming it does, the question is whether the principle can be held to apply to the facts of the present case. In our opinion it cannot be held to apply. The Court ought not to hold a point to be *res judicata* unless it is clear from the pleadings and the findings in the previous suit, and as has been held in several decisions " no Court ought to infer *res judicata* by mere arguments from a judgment in a previous suit " : see *Attorney-General for Trinidad and Tobago* v. *Eriche*[1]. In the previous suit, no doubt, the Court of first instance held that Rukhmini was entitled to the ornaments, because in the opinion of that Court they were her *stridhan* ; the second Court held that Rukhmini was entitled to those ornaments, not because they were her *stridhan*, but because she was the absolute owner of the property. These findings cannot be treated as *res judicata* as between co-plaintiffs in that suit, that is, as between Rukhmini the defendant, and Dhondo the plaintiff in the present suit, because no issue was raised in the Court of first instance in that suit which brought out the question in a pointed form. The only question that was raised there was whether Rukhmini was the absolute owner of the

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property. Now that issue was capable of construction in only one way, namely, whether she took an absolute interest in the estate of her deceased husband, though a Hindu widow. Still the Subordinate Judge was of opinion that she was the absolute owner of the ornaments because they were her *stridhan*. The second Court held in her favour, but upon another ground. We cannot say that there was a final adjudication as between Rukhmini and Dhondo which made it *res judicata* for the purpose of any subsequent litigation. The principle of *Ramchandra Narayan* v. *Narayan Mahadev*[1] is wanting in the facts of the present litigation. As was held in that case, a finding in a suit as between co-defendants becomes *res judicata* in a subsequent suit only when it was essential for the purpose of giving relief to the plaintiff in the previous suit. So also as between co-plaintiffs a finding to become *res judicata* must have been essential for the purpose of giving relief against the defendants. Now here, in the previous suit it was a matter of no consequence whatever to the defendant therein for the purposes of the relief to be given against him whether Rukhmini succeeded or whether Dhondo succeeded. Therefore, the plea of *res judicata* raised in this second appeal must be disallowed.

But the appellants are entitled to succeed as to the ornaments upon another ground. The plaintiff came into Court alleging that he was the owner of the ornaments. The burden of proof lay upon him to show that the ornaments belonged to the estate of Mahadu and that they were not the *stridhan* of Rukhmini. Therefore, he ought to have given evidence to prove his allegations. The bulk of the evidence was directed towards proving whether Rukhmini was the widow of Mahadu or not. The Subordinate Judge held that the ornaments belonged to Mahadu's estate, because it had been so held in the previous suit and probably it is also the ground on which the Subordinate Judge in the Appellate Court has proceeded. But if the finding in the previous suit cannot be treated as *res judicata*, it cannot be used against

[1] (1886) 11 Bom. 216.

either of the parties. The plaintiff was bound to prove his case. And although we cannot take into consideration the evidence in the previous suit, yet we have the fact that the appellant obtained a decree entitling her to the ornaments and that the respondent was a party to it. The burden lay upon the plaintiff to prove that the ornaments were not the *stridhan* of Rukhmini.

In this case the plaintiff has not discharged the onus which lay upon him. The facts stand thus: Rukhmini has a decree in her favour; to that decree Dhondo was a party; the plaintiff has not proved that the ornaments are not the *stridhan* of Rukhmini. On these grounds, therefore, the decree of the Court below so far as the ornaments are concerned must be reversed. We must, therefore, amend the decree by deleting that portion of it which relates to the decree in original suit No. 77 of 1905 and the ornaments there concerned. The plaintiff is declared to be the owner only of such property as is not covered by the decree in that previous suit.

The decree must be amended accordingly.

Each party to bear his own costs throughout.

Decree amended.

R. R.