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Then it was argued that the plaintiff lay under an estoppel because Dattatraya, who was a plaintiff in a suit against the Guru, admitted that he had parted with his share in favour of his brother. There could be no case of estoppel. It would be a question of proof whether Dattatraya had, as a matter of fact, transferred his share to his brother, the present defendant, for it is difficult to say that in consequence of that statement the defendant altered his position for the worse. However that may be, it is hardly necessary for the purposes of this case to decide when sitting in second appeal, that as a matter of fact Dattatraya, when he purported to assign his share to the plaintiff, had already surrendered it to his brother. We decide the case on principles that are already recognized in this Court. Dattatraya, although he could have given up his share in the office to his brother, could not endeavour to alienate it either to a person outside the family or to the original grantor or a descendant from him. The appeal, therefore, must be allowed and the suit dismissed with costs throughout.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

1922. *November* 10.

GANGARAM BALKRISHNA SAWANT (ORIGINAL PLAINTIFF), APPELLANT *v.* VASUDEO DATTATRAYA KIRLOSKAR, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

*Civil Procedure Code (Act V of 1908), section 11—Suit for partition—*Res judicata *as between co-defendants.*

* Second Appeal No. 794 of 1917.

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In 1890, a member of a joint Hindu family sued to recover his share by partition of the family property and obtained a decree. One of the defendants in that suit filed another suit in 1909 to recover his share by partition of the remaining family property. It was contended by defendants in the later suit that the property in their hands was not joint family property. A question having arisen whether the defendants could raise the contention or were barred from doing so by *res judicata* :—

Held, that the defendants were not debarred from advancing their contention, since there was nothing to show that in the earlier suit there was a necessity that the question whether the remaining property in the hands of the then defendants was joint family property should be decided in order to give relief to the then plaintiff.

Ramchandra Narayan v. *Narayan Mahadev*[1], applied.

Nalini Kanta v. *Sarnamoyi Debya*[2], distinguished.

SECOND appeal from the decision of T. R. Kotwal, Assistant Judge of Ratnagiri confirming the decree passed by E. F. Rego, Subordinate Judge at Malwan.

Suit for partition.

A joint Hindu family consisted of two branches, headed by Rama and Sadashiv, each owning a one-half share in the family property. Defendants Nos. 4 to 14 were descended from Sadashiv. Rama's branch comprised plaintiff and defendants Nos. 1 to 3.

In 1890, one of the members of the Rama's branch sued all the members in both branches to recover his share by partition and obtained a decree.

In 1909, another member of the same family sued all the remaining members of both branches to recover his share by partition of the remaining family property. The defendants pleaded that the property in their hands was not joint family property. The plaintiff contended that the defendants were barred by *res judicata* from raising the plea.

The lower Courts held that the defendants were not so barred and dismissed the suit.

(1) (1886) 11 Bom. 216.

(2) (1914) 17 Bom. L. R. 1.

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The plaintiff appealed to the High Court.

G. N. Thakor with *S. Y. Abhyankar*, for the appellant:—This is a partition suit and the defendants contest the claim. But it is not open to the defendants to oppose partition. As a result of Suit No. 345 of 1890, it should be held that the defendants cannot question the position that the property is joint and divisible. The suit of 1890 was a partition-suit and all the members of the family were parties to it. As it was a suit for partition, all the parties to it occupied the same position whether they were plaintiffs or defendants. This is clear from the decision in *Nalini Kanta* v. *Sarnamoyi Debya*[1]. In the previous suit partition was allowed on the footing that the family was joint. Hence the defendants are estopped from contesting this claim. See also *Ramchandra* v. *Abaji*[2].

[CRUMP, J. :—referred to *Ramchandra Narayan* v. *Narayan Mahadev*[3].]

The previous suit must be held to have proceeded on the assumption that the family was joint and the property belonged to the family and to that extent the decision is *res judicata*.

S. R. Bakhale, for respondents Nos. 14, 17, was not called upon.

P. B. Shingne, for respondent No. 29.—I am for respondent No. 29 who is an alienee. He was not joined in the previous suit, though he was interested in some of the property in suit. So also some of the other defendants who are parties to this suit were not then impleaded though they were interested in the property.

MACLEOD, C. J. :—The plaintiff filed this suit for partition of property alleged to be joint family property,

(1) (1914) 17 Bom. L. R. 1.
(2) (1886) P. J. 15.
(3) (1886) 11 Bom. 216.

claiming 1/10th share therein. The property originally no doubt was the joint family property of the Kirloskars. The pedigree of the family appears at p. 23 of the print. It shows that several generations back the family had been split up into two branches, and undoubtedly for years, various members of each branch have been alienating portions of the family property as if they were separately owned. Apparently the allegation of the defendants who contest the plaintiff's suit is that there was a partition of the family property so far back as 1823. The evidence shows that the whole of the family property has got into the hands of strangers. The plaintiff seeks to set aside the alienations made by various members of the family, and to get back 1/10th of what was originally the family property on the ground that the property is still joint, and that he is entitled, in spite of those alienations, to his proper share therein. The first issue, the main issue in the suit, was whether the plaint property was the joint property of the parties, Kirloskars. That issue was found in the negative. Both the lower Courts have come to the conclusion that very many years ago there had been a partition certainly between the two branches, and the plaintiff's branch had nothing to do with the other branch. The plaintiff, however, relies upon the principle of *res judicata*, as estopping the defendants from contesting his claim to partition.

The plaintiff's contention has been disallowed in both the lower Courts, and has been fully argued by the appellant's counsel in this Court. The plaintiff relies upon the proceedings in Suit No. 345 of 1890. That was a suit filed by Sakharam, one of the five sharers of Rama's branch in the pedigree at p. 23. The plaint is drawn in a very ambiguous manner. It stated that "certain lands and the whole village of Kirloo formed the undivided joint ancestral property of the plaintiff

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and defendants Nos. 1—4 and 10—21, the share of the plaintiff and defendant Nos. 1—4 being half and that of defendants Nos. 10—21 half, that these latter held separate property as their share from a long time, the plaintiff's share in his own branch is 1/5th and of the whole property 1/10th, that if defendants Nos. 10—21 confirm the old private partition the plaintiff should be awarded 1/5th of such property as is held by his own branch or otherwise 1/10th in the entire property". Owing to various alienations which had already then been made, the only contesting defendant in that suit was defendant No. 5 who set up a mortgage by other members of Sakharam's branch. Sakharam contended that that mortgage was not binding on his share. That contention prevailed. It is quite true that the decree seemed to have directed that the plaintiff was entitled to 1/10th of the whole property, but a direction in the decree is given that, if the plaintiff's share in the Khasgi lands held by his own branch consisting of himself and his own brothers can be made up from other lands held by that branch of similar quality, then in that case the lands mortgaged to defendant No. 5 should in partition be allotted to the shares of defendants Nos. 1—4 and continued in the possession of defendant No. 5.

There is no evidence to show how that decree was carried out or whether in execution the plaintiff obtained any properties that were in the possession of members of the other branch or their alienees.

But the question now before us is whether the other persons who were entitled to 9/10th of the whole property were barred by the decision in that suit from contending thereafter that the 9/10th which remained in their hands was not joint family property, so that they were bound by the finding in that suit to partition 9/10th on a partition being asked for by any

member of the other branch. Apart from that, it is clear to my mind that there is no direct finding that the whole of the property which was originally joint was still joint at the time of this decree.

The principle to be followed in deciding the question whether a matter is *res judicata* as between co-defendants in a suit was laid down in *Ramchandra Narayan* v. *Narayan Mahadev*[1]. The head-note says ;—

"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 for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. 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."

Applying that dictum to the facts of this case, even assuming that all the defendants in the suit of 1890 collectively resisted the claim to a share made against them as a group by the plaintiff, and were defeated, unless it could be shown that there was a necessity that the question whether the 9/10th was joint family property in their hands should be decided in order to give relief to the plaintiff, then no question of *res judicata* could arise in a later suit between those parties. It is obvious from the judgment in the suit of 1890 that the present question was never at issue. There was no necessity to decide whether as between the persons who might be entitled to the remaining 9/10th of the family property, that property in 1890 was joint or separate. The decision in *Ramchandra* v. *Abaji*[3] is not in conflict with the decision in *Ramchandra Narayan* v. *Narayan Mahadev*[1] as that

(1) (1886) 11 Bom. 216. (3) (1886) P. J. 15.

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decision was referred to by Mr. Justice West and distinguished. In the former case their Lordships referred to certain Calcutta cases in which it was laid down that "the material point for deciding whether a matter had become *res judicata* under section 13 is whether it was directly and substantially in issue between the same parties and was finally decided. If the issue is clearly raised between the several parties to the suit and adjudicated, it matters not that the parties were marshalled in the one case differently from the other". That is an entirely different question from the one which came before this Court in *Ramchandra Narayan* v. *Narayan Mahadev*[1] where the test was whether there was the necessity to decide the point, whether as a matter of fact it was ever raised between co-defendants, and whether it was decided. That decision has been consistently followed by this Court. I need only refer to the decision of *Hari Annaji* v. *Vasudev Janardan*[2].

No doubt in a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants, and a party claiming or resisting partition, whether he is plaintiff or defendant, is bound by the decision of the Court. But in this case none of the parties were claiming or resisting partition except the plaintiff, and therefore any questions regarding partition which might thereafter arise between the defendants in that suit remained open to be decided. Nor is the decision in *Nalini Kania* v. *Sarnamoyi Debya*[3] of any assistance to the plaintiff. In that case there had been a succession of suits for partition by various members of the family until there was only one left who had not filed a suit for partition, with the result that all the members who had filed suits had got their shares, and the

(1) (1886) 11 Bom. 216. (2) (1914) 38 Bom. 438.
(3) (1914) 17 Bom. L. R. 1.

balance of the property remaining in the hands of the last member of the family represented his share. He claimed that as a result of the various partitions what was left to him was less than his legitimate share in the family property. He sought to reopen the various partitions which had taken place in consequence of the suits brought by the other members of the family, and it was held that the various partitions made were binding upon him. That does not in any way touch the question now before us whether, between the defendants in the suit of 1890, the question whether the property was joint or separate is *res judicata*. What the plaintiff seeks to do in this suit is to recover a share in the whole property after his own interest in his own branch had been alienated and after the other members of the other branch had alienated their properties. It is perfectly clear that he is not entitled to upset the various dealings with the family property which had taken place over a very lengthy period. The original plaintiff seems to have alienated his interest, whatever it might be worth, in this property pending the first appeal, and the present appellant is really a purchaser of litigation. In my opinion the appeal must be dismissed with costs.

CRUMP, J. :—I concur.

Appeal dismissed.

R. R.