ORIGINAL JURISDICTION. (*a*)

Original Suit No. 44 *of* 1862.

MOHIDIN *against* MUHAMMAD IBRAHIM and others.

In a foreclosure-suit in which a A was plaintiff and B, C and D were defendants :—*Held*, that A was estopped by a previous verdict on the point in issue in an ejectment in which C and D were plaintiffs and A was defendant.

1863. *March* 4. *O. S. No.* 44 *of* 1862.

THE plaintiff claimed rupees 10,485-12-5 due on a mortgage of ten houses in Black Town, dated the 28th of September 1861, and made by the defendant Muhammad Ibrahim, to secure re-payment to the plaintiff of 10,000 rupees within one year and on a rent-agreement of the same date ; and that in default of payment the defendant should be foreclosed.

On the 15th of January 1862, the defendants DeSouza and Cammiade, having obtained a verdict in the late Supreme Court against the mortgagor for rupees 15,098, caused the Sheriff of Madras to seize and sell the mortgaged premises under a writ of fieri facias, and brought them all, with the exception of one house No. 1 in Mira Labbai Street. And on the 6th of April 1862 they commenced an action of ejectment in the late Supreme Court at Madras to recover one of the houses which they had so bought, and which was then in the possession of a tenant of the mortgagor's. The plaintiffs Mohidin was let in to defend, and upon the trial of the action he claimed title to the house as mortgagee in possession and produced the instrument of mortgage in support of that title. Mohidin falled to establish the genuineness of his mortgage and a verdict was accordingly found for DeSouza and Cammiade.

The first issue in the present suit was whether the mortgage was genuine. The second was whether under the circumstances the court was precluded from taking cognizance of the suit by section 2 of the Code of Civil Procedure.

That section provides that " the Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim."

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The proceedings in the former action were put in.

The Advocate General (*Norton* with him) for the plaintiff, referred to the note to the *Duchess of Kingston's Case* in 2 Smith's *Leading Cases*.

Branson (*Arthur Branson* with him) for the defendants, contended that the plaintiff was estopped by the judgment in the former action.

SCOTLAND, C. J :—It will be best to amend the second issue. Let it stand thus : whether or not by reason of the former judgment the plaintiff is estopped from having the present suit heard and determined.

The amendment was accordingly made.

SCOTLAND, C. J :—We are clearly of opinion that the point in issue as to the mortgage was decided in the former action. No proposition of law is more firmly established than that when in a former suit the parties were the same, and appeared in the same capacity, and the same point was in issue, the judgment on such point is conclusive on those parties. It is not necessary that the form of action should be the same in each case. Nice questions were raised under the old system as to whether the benefit of an estoppel was waived a party who did not plead it when he had an opportunity of doing so. But here of course all question on this score is got rid off by the issue on record.

The facts of the present case are that the present second and third defendants were the plaintiffs in the former action respecting one of the ten houses comprised in the present suit. In that action the present plaintiff was a defendant: the same mortgage was set up as in the present case: the present plaintiff claimed as mortgage under that instrument; and the Court gave judgment to the effect that the document in question was not genuine.

Now nine other houses are in litigation, but under precisely the same claim of right set up in respect of the self-same mortgage. Consequently as between Mohidin on the one part and DeSouza and Cammiade on the other, the identical point has been adjudged and must be considered to be so as regards the nine houses. As regards these houses, therefore, the plea of estoppell is established. The

Advocate General contended that the fact of another name being introduced as a party, distinguished the present case from others. But that cannot be so in this case. Otherwise every case of estoppel by judgment *inter partes* might be got rid of by introducing a man of straw as a plaintiff or defendant in the subsequent suit. Here the additional party is the alleged mortgagor who makes no defence, and the mortgage being invalid, the other defendants are admittedly entitled to the nine houses as his execution-creditors. As to the tenth house the case is admitted by the first defendant, and the plaintiff must have a verdict for it. The defendants DeSouza and Cammiade are entitled to a verdict as to the remaining nine.

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The second and third defendants will have their costs in full. The plaintiff will have his costs against Muhammad Ibrahim down to the time of the settlement of issues.

ORIGINAL JURISDICTION. (*a*)

BRASS *against* TIRUVENGADA PULLAI.

The High Court has no power under the Civil Procedure Code to award costs to the defendant when the plaintiff withdraw, not having asked leave to do so with liberty to bring another suit for the same matter.

THIS case was in the daily cause-paper, but the plaintiff, before it was called on for trial, withdrew from the suit, without having asked permission of the Court to do so with liberty to bring another suit for the same cause of action.

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Branson for the defendant applied for costs, and referred to Sections 97 and 187 of Act VIII of 1859.

PER CURIAM :—We cannot grant costs. Sections 97 and 187 are the sections in the Civil procedure Code which empower the Court to award costs. The former sections does not apply, as the plaintiff has not asked for leave to withdraw and bring a fresh suit for the same matter. Section

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