APPELLATE JURISDICTION (*a*)

*Regular Appeal No. 62 of 1866.*

GOPÁLAYYAN..... *Appellant.*

RÁGHUPATI AYYAN *alias* AIYÁVAYYAN ..... *Respondent.*

In a suit brought to set aside the adoption of the 1st defendant, to declare plaintiff's title to certain lands, and for possession, the 1st defendant pleaded that the question of his adoption was *res judicata* in a former suit. In that suit, between the present plaintiff's son as plaintiff and his father (the present plaintiff) as 1st defendant, and the present 1st defendant, the alleged adopted son, as 2nd defendant, the latter was found to be the adopted son of the undivided brother of the present plaintiff.

*Held*, that the 1st defendant's adoption was not *res judicata*. The cases reported at I M. H. C. Reps. 45 and II *id.* 131, distinguished.

1866. *November* 15. *R. A. No.* 62 *of* 1866.

THIS was a regular appeal from the decree of F. S. Child, the Civil Judge of Tinnevelly, in Original Suit No. 8 of 1866. The suit was brought to set aside the adoption of the 1st defendant, the alleged adopted son of plaintiff's undivided brother : to declare plaintiff's title to certain lands, and for possession. The 1st defendant pleaded that the question of his ( 1st defendant's ) adoption was res judicata in a former suit. That suit, between the present plaintiff's son as plaintiff and his father the present plaintiff as 1st defendant, and the present 1st defendant, the alleged adopted son, as 2nd defendant, was brought to obtain a moiety of the family property, and the 2nd defendant (now 1st defendant) pleaded .that he, as the adopted son of the undivided brother of 1st defendant, held half the family property and that therefore the plaintiff was not entitled to the share claimed. Upon that the issue was settled—Is the 2nd defendant (1st defendant in this suit) the adopted son of Appavaiyar (undivided brother of the present plaintiff)—and this issue was decided in the affirmative.

The Civil Judge decided that the question was res judicata and dismissed the suit. The plaintiff appealed.

*Advocate General*, for the appellant, the plaintiff.

(*a*) Present : Collett and Ellis, J. J.

1866. November 15. R. A. No. 62 of 1866

*Srinivasachariyar*, for the respondent, the 1st defendant.

The Court delivered the following.

JUDGMENT :—We are of opinion that the Civil Judge was in error in holding that the plaintiff in the present suit is concluded, upon the question of the adoption of the 1st defendant, by the decree in the former suit, No. 33 of 1862, so far as that depended upon or involved a decision upon the same question. That decree will, no doubt, conclude the then plaintiff (the present plaintiff's son), and all who do, or may hereafter claim through him, as to all questions then in issue and essential to the decision of that suit ; but further than that it cannot go.

It is quite clear that in the present suit the claim of the present plaintiff is founded upon his own right, antecedent in its origin to, and independent in its nature of, any claim of his son to the family property.

It is quite out of the question to treat the decree in the former suit as a judgment *in rem* upon the adoption of the present 1st defendant. That was simply a suit between parties to enforce the right of the son to a partition of the family property, and, for the purpose of ascertaining what was the share to which the son was entitled, it became necessary to ascertain and decide whether the present 1st defendant had been duly adopted into the family.

Then can the decision of that question in the former suit be treated as conclusive as a judgment *inter partes* upon the present plaintiff, who was in fact 1st defendant in that suit ? It seems very clear that it cannot.

Numerous definitions have been given of what constitutes a judgment *inter partes* conclusive as *judicata* ; but it will be found that the present case does not fall within any one of them, and that the two suits now under consideration are identical in scarcely any one, and certainly not in all, of the essential points on which identity is requisite. There is, for instance, in the present suit neither the same right, nor the same cause of action, nor the same condition of the parties as there was in the former

1866. *November* 15. *R. A. No.* 62 *of* 1866.

suit. Or if we apply a test of procedure, then it is quite clear, as indeed was admitted, that the present plaintiff could not, as 1st defendant in the former suit, have appealed from the former decree because it allotted to his son, the then plaintiff, one-fourth of the family property, instead of one-half as the son claimed. With reference to some remarks in the present judgment of the Civil Judge it may not be superfluous to observe that, of course, the efficacy of the fact of the present plaintiff having been a party to the former suit does not at all depend upon whether he then duly appeared or allowed the suit to be heard ex-parte as against himself.

It only remains to notice the judgments of this Court relied upon by the Civil Judge and which are to be found reported respectively in I M. H. C. Reps. 45, and II *id.* 131. In the former case it is quite clear that there was the same condition of parties in the subsequent as in the prior suit, for the defendants in the subsequent suit were the representatives of the defendant in the prior suit, and of course were concluded equally as he would have been. That case is, therefore, not in point for the present purpose. And the latter case is also not in point, for there the parties in both suits were precisely the same with their respective positions, as plaintiff and defendant, reversed, and all that was then decided was that a party cannot as plaintiff in a subsequent suit between the same parties regarding the same object matter, put forward a ground of claim upon which he, as defendant in a prior suit, either in fact unsuccessfully relied, or might and ought to have relied as a ground of defence.

We consider the judgment of the Civil Court upon the preliminary issue, which alone was framed and decided, to be erroneous, and we therefore, under Section 351 of the Code of Civil Procedure, reverse the decree of the Court below, and remand the suit in order that it may be restored to the register and decided upon the merits. The costs hitherto to be costs in the suit.

*Appeal allowed.*