Appellate Jurisdiction(a)

Regular Appeal No. 115 *of* 1872.

MUTHUMADE'VA NAIK..................*Pauper Appellant.*

SEVATTAMUTHUMADE'VA NAIK........*Respondent.*

Referred to & approved 28 Mad 406

Plaintiff sued to recover a zamindárí from his step-brother, alleging that the zamindárí was hereditary property belonging to the family, the succession thereto being governed by the law of primogeniture; that his father died in 1859, leaving the plaintiff, defendant, and another, his sons, the former by the 1st wife, and the latter two by the 2nd wife; and that the defendant (respondent) unlawfully enjoyed the estate, while plaintiff, as the eldest son, had a legal claim thereto. In defence it was pleaded that the claim was *res judicata* by the decree of the Civil Court of Madura in *Suit No.* 2 *of* 1857, confirmed by the Sadr Court in *Appeal Suit No.* 234 *of* 1859. That suit was brought by plaintiff to obtain a declaration of his status as the son of his father's Pattába Strí, or royal wife. Plaintiff's father was 1st defendant, and defendant's mother was 2nd defendant in that suit, and both denied that plaintiff was son of the Pattába Strí and affirmed that 2nd defendant was 1st defendant's 1st wife, and that her sons were preferential heirs to the zamindárí. Among the points recorded was for "plaintiff to prove his status and right as alleged," and same was set down for defendants to rebut. The Judge disbelieved that plaintiff was the son of his father's 1st wife and added "plaintiff further pleads that he is the eldest son, a position not denied, but one which cannot confer on him the status he now claims." The Judge decided that plaintiff had failed to prove that his mother was the Pattába Strí, and that he was heir to the exclusion of 2nd defendant's sons. On appeal to the Sadr Adálat the decree below was confirmed and the Court made the following observation:—"It has been attempted at the hearing of the appeal to maintain the plaintiff's right to succeed as being the eldest son. This, however, was not the position taken in the Court below, where the succession was allowed to depend on another circumstance, namely, the mother being the Pattába Strí, and the Court, therefore, hold the argument to be an inadmissible one."

Held, on Appeal, that the present Suit was barred by res judicata, a different "caussa" to the former not having been adduced.

To the judgment reported at 3, M. H. C. R., 326-34 after the words in p. 334 "in favor of the defendant all the objective grounds of the decision which have lead to the dismissal of the suit," the following ought to be added "and without the establishment of which the suit could not have been logically or legally dismissed."

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THIS was a Regular Appeal against the decision of J. D. Goldingham, the Civil Judge of Madura, in Original Suit No. 16 of 1871.

Plaintiff brought the suit to recover from defendants, his step-brothers, the zamindárí of Madavanaickanúr Puliengulam, together with certain moveable property, alleging that the zamindárí was hereditary property belonging to the family, the succession thereto being governed by the law of primogeniture; that his (plaintiff's) father enjoyed

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the estate until 2nd October 1859, when he died, leaving plaintiff and the defendants, his sons, the former by the 1st wife Lingammâl and the latter by the 2nd wife Vîrachinnammál; and that the 1st defendant unlawfully enjoys the said estate, and the 2nd defendant the remaining property, while plaintiff, as the eldest of the three, has a legal claim thereto under Hindu law and usage.

The 1st defendant pleaded that the claim was *res judicata* by the decree of the Civil Court of Madura in *Original Suit No.* 2 *of* 1857, confirmed by the late Sadr Court in *Appeal Suit No.* 234 *of* 1859; that the son of Pattába Strí, or royal wife, is the next heir to succeed to the zamindárí as sanctioned by usage; that the Government must be made parties to the suit, inasmuch as they conferred the estate, which is an unsettled polliem, on 1st defendant, recognizing his rights thereto. Both defendants alleged that they were not in possession of certain portions of the moveable property described in the plaint.

The Civil Court, holding that there were two distinct causes of action which had better be tried in separate suits, one against 1st defendant for unlawfully withholding the zamindárí, and the other against 1st and 2nd defendants for being in unlawful possession of the ancestral undivided property, ordered that the plaint be divided accordingly, and the case against 1st defendant placed on its file, the other being referred to the Principal Sadr Amín for disposal.

The following issue, among others, was settled—

Whether the plaintiff is estopped by *res judicata* from bringing this suit.

Defendant produced the following Exhibits—

I. Certified copy of the decree of the Civil Court in *Original Suit No.* 2 *of* 1857.

II. Do. do. of the late Sadr Court confirming do. in *Appeal Suit No.* 234 *of* 1859.

The Civil Judge delivered the following judgment—

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"This is a suit brought by plaintiff to recover the zamindárí of Madavanaikanúr Puliengulam by right of primogeniture. There is no dispute as to the relationship existing between the parties, both plaintiff and defendants being the sons of the late Zamindár, one Sunmuga Madava Naikar, by different mothers, and the plaintiff's claim is based upon his being the eldest son,—a fact which is likewise admitted by the defendants. The defence, that is to say, the only portion of it I am about to consider at present, is that the claim is *res judicata* by the decree of this Court in *Suit No.* 2 *of* 1857, and I am of opinion that it is.

On an examination of the documents filed in this case, Exhibits I and II, the only papers connected with the suit that have been preserved, I find that that suit was brought by the present plaintiff with a three-fold object, only one of which need be stated here, namely, to obtain a declaration of his status as the son of his father's Pattába Strí, or royal wife, and consequently that he would be entitled to inherit the zamindárí on his father's death, to the exclusion of the present defendant's mother and her children. The plaintiff's father was 1st defendant in the suit, and defendants' mother was the 2nd defendant, and both of them contested the action. In their answer both defendants took exception to the allegation that plaintiff was the son of 1st defendant's Pattába Strí, while they affirmed that 2nd defendant was 1st defendant's first wife, and they contended that her sons were the preferential heirs to the zamindárí, and these respective allegations were reiterated in the reply and rejoinder. Points were then recorded by the Civil Judge, and among those set down for plaintiff was "to prove his status and right as alleged," and the same was set down for 1st and 2nd defendants to be rebutted. In the judgment the Civil Judge stated that plaintiff's claim hinged upon his being the son of his father's first wife, and then, after recording his reasons for discrediting the evidence brought in support of this allegation, he added "plaintiff further pleads that he is the eldest son, a position not denied, but one which cannot confer on him the status he now

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claims." In conclusion, in the decretal part of the judgment he stated that, under the above circumstances, the Court is of opinion that the plaintiff has failed to prove that his mother was 1st defendant's Pattába Strí, and that he is 1st defendant's heir *to the exclusion of 2nd defendant's sons*, and consequently the suit was dismissed with all costs. An appeal was preferred against this decision to the Sadr Adálat (*R. A. No.* 234 *of* 1859), the appeal being defended by the 2nd defendant, for plaintiff's father died before the case came on for hearing, and the result was that the decree of the Court below was affirmed. In their judgment their Lordships make the following observation, on which plaintiff's Counsel now relies. "It has been attempted at the hearing of the appeal to maintain the plaintiff's right to succeed as being the eldest son. This, however, was not the position taken in the Court below, where the succession was allowed to depend on another circumstance, namely, the mother being the Pattába Strí, and the Court, therefore, hold the argument to be an inadmissible one."

Under these circumstances, the point I have to determine is whether the present cause of action, namely, plaintiff's right to this zamindárí, was a matter determined in that suit or not, and, if so, whether it is binding on the parties to this litigation.

It is beyond question that the exceptio reijudicatæ bars every claim which may be adverse to the matter of the judgment—"quotiens inter easdem personas eadem questio revocatur." In respect, however, of the requisites for the identity of a legal contention, twot hings are noticeable; (1), The exceptio falls to the ground when no identity exists, even though the subsequent action may resemble the former one; and (2), the exceptio is maintainable where the identity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar. Now the argument on behalf of plaintiff is that there is not such a complete identity as should operate in bar of his suit; (1), that the question of right or origin of right involved in this case is different from the question of origin of right involved in the other;

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and (2), that there is not the same condition of parties. Upon the subject of the "question of right," his vakil contends in effect, though not in identical words, that the former suit was not decided upon the same objective grounds which are now put forward as the condition of the right which is sought to be established, and that, consequently, he is not concluded by the decree passed therein. I doubt, however, whether this is a correct interpretation of the law which the facts of the case give rise to. Plaintiff, it is true, put forth his claim in the pleadings as based upon his being the son of the Pattába Strí, but he also in argument set up his present ground of contention, namely, his being the eldest son, a position which being admitted was not put in issue, and the Judge pronounced it as a position which could not confer upon him the status he then claimed. Whether he was right or wrong in so determining, I am not called upon to express an opinion,—it is enough that this ground of legal right was a point raised and opened for decision, and that it was finally dealt with in the judgment and decree of the Court of First Instance. So far the matter is clear at all events, but what plaintiff in truth relies upon is the observations of the Judges of the Sadr Court in their appeal judgment noted before. I am not free from doubt certainly, but I think that if the Court were mistaken in the view they adopted, plaintiff should have carried the case a step further to the Privy Council. But in no case do I see that the Sadr Court advisedly shut out this question from consideration and adjudication. What they said was that they considered the argument an inadmissible one, because the position taken in the Court below was that the succession admittedly depended upon another circumstance, namely, the mother being a Pattába Strí. I think, therefore, in this respect plaintiff's contention is not maintainable.

The other question is whether the decree is binding between the parties, whether, that is to say, there is identity of subject as well as of object. The defendant was not actually a party to the former suit certainly, but it must, I think, be held that he was a privy to it. The principle of estoppel, as applied to privies, is that a party claiming through another

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is estopped by that which estopped that other respecting the same subject-matter, and thus an heir, who is privy in blood, is estopped by a verdict against his ancestor through whom he claims. It is quite clear that had the former judgment gone the other way, plaintiff's father and defendant's mother would have been estopped from again agitating this question, and it is through them that defendant claims and has since inherited. Defendant was not actually a party on the record of that suit, because he was a minor at the time, but he was especially represented by his mother, and specifically mentioned as belonging to the class of persons which it was sought to exclude from the succession. I think, therefore, as a privy in blood he would have been bound by that decree, and if this is so, it completes the identity. For a very accurate and learned exposition of the law on the subject I would refer to the cases quoted in the Madras H. C. R., Vol. II, page 131, and in Vol. III, page 320, the former of which was affirmed in appeal in XI, Moore, page 50, as well as to 5, M. H. C. R., page 176, and it has been my endeavour to decide this case in accordance with the principles therein enunciated :—I have only to add that the identity is not destroyed by the former suit being for a declaration of title and this being brought to recover possession. For these reasons I think plaintiff's suit must be dismissed with all costs."

The plaintiff appealed upon the following ground—

The conclusion arrived at by the Civil Judge upon the 1st issue is contrary to law, neither of the decrees pleaded amounting to an estoppel in respect of the present suit.

O'Sullivan, for the appellant, the plaintiff.

Mayne, for the respondent, the 1st defendant.

The Court delivered the following

JUDGMENT :—The present appeal was admitted to determine whether the suit was barred by the decision of the declaratory suit promoted against those, whom defendant represents, by the present plaintiff. The ground of denying the bar by *res judicata* is that he there put his right of inheritance

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on the ground of sonship by the Pattába Strí, and that he puts it now upon the ground that he is the eldest son of his father. It appears that this fact was before the Civil Court, which says that the fact is admittedly indifferent and not capable of conferring the status claimed. To allow this ground to be set up now would, therefore, be to do what it was sought to do in the *Shivaganga case,* set up a ground of claim which the litigant had in the previous case expressly withdrawn by his admission from the cognizance of the Court. The Sadr Court refused to listen to the point put forward in appeal because the case had not been put upon that ground. This may have meant "you shall not assert a ground of law arising "out of the facts stated, if you have not urged that ground of "law in the Lower Court," and the decision would be wrong, or it may mean "you dispensed the Court below from con-"sidering this ground and you shall not urge it now," when, according to the decision of the Privy Council, it would probably be right. If it was wrong the remedy was by appeal. Whether right or wrong, it is, as this case was treated, a decision against him.

The better opinion probably is that he would be barred whether this ground of being heir was brought forward or not. The "caussa" in the first suit was "being heir," and Paulus does not say that a new suit for the same object-matter may be brought because a new basis in fact of the same "caussa" is adduced, but where there is a different "caussa." The present case seems to fall within his words "mutatam "actionem opinio petitoris non facit." In every point of view the plaintiff is, in our opinion, clearly barred, and this appeal must be dismissed with costs.

To the judgment referred to in III, M. H. C.,(*a*) after the words "in favor of the defendant all the objective grounds of the decision which have led to the dismissal of the suit" the following ought to be added "and without the establishment of which the suit could not have been logically or legally dismissed."

Appeal dismissed.

(*a*.) pp. 326—334.