

Before Mr. Justice Hill and Mr. Justice Brett.

SHYAMA CHARAN BANERJI

v.

MRINMAYI DEBI.*

1902

Aug. 27.

Res judicata—Civil Procedure Code (Act XIV of 1882) s. 13, Expl. II—
“Matter directly and substantially in issue.”

In a previous suit brought by the defendant's husband against the plaintiff, for a declaration of his title to a moiety of a garden purchased from the ancestors of the plaintiff and for partition, the suit was not defended and an *ex-parte* decree was passed. In a subsequent suit by the plaintiff to have his title to the said garden declared, to have the sale to the defendant's husband set aside as having been made without legal necessity, and to recover possession, the defence was that the suit as regards the moiety of the land was barred by the operation of s. 13 of the Civil Procedure Code:—

Held, that the question of the validity of the sale to the defendant's husband ought to have been raised by way of defence to the previous suit and it must therefore, by virtue of Explanation II to s. 13 of the Civil Procedure Code, be treated as having been directly and substantially in issue in that suit, and was consequently *res judicata*.

Sundar v. Parbati(1) distinguished.

Mahabir Pershad Singh v. Macnaghten(2) and *Kameswar Pershad v. Rajkumari Ruttan Koer*(3) referred to.

SECOND APPEAL by the plaintiff, Shyama Charan Banerji.

This appeal arose out of an action brought by the plaintiff to recover possession of a parcel of garden land. The allegation of the plaintiff was that the said garden land belonged to his father and uncle, that on the death of his father he obtained possession of the half share, and the other half went to the heirs of his uncle.

*Appeal from Appellate Decree No. 454 of 1900, against the decree of Karuna Das Bose, Subordinate Judge of 24-Perganas, dated Dec. 19, 1899, reversing the decree of Jogendra Nath Deb, Munsif of Sealdah, dated April 29, 1899.

(1) (1889) I. L. R. 12 All. 51; L. R. 16 I. A. 186.

(2) (1897) I. L. R. 16 Calc. 682; L. R. 16 I. A. 107.

(3) (1892) I. L. R. 20 Calc. 79; L. R. 19 I. A. 234.

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Kalikamal and Nilkamal; that on the death of Kalikamal his widow Trailokyamohini succeeded to his one-fourth share, and on her death it passed to Govindamohini, Kalikamal's mother; that on the death of Nilkamal, his widow Bhabatarini succeeded to his one-fourth share; that Bhabatarini died in November 1888, and Govindamohini died in November 1894, leaving the plaintiff as the sole reversionary heir to their estates; that on the 8th January 1888 the defendant's husband purchased from Bhabatarini her one-fourth share in the garden, and on the 4th June 1890 he purchased from Govindamohini her one-fourth share; that the defendant dispossessed him (the plaintiff) from the whole of the garden, and hence the suit was brought for recovery of possession on a declaration of title thereto, and to have the sale to the defendant's husband set aside as having been made without legal necessity.

The defence was, that the suit as regards the moiety of the land was barred by the operation of s. 13 of the Civil Procedure Code, on the ground that in the year 1895 a suit was brought by the defendant's husband against the present plaintiff for a declaration of his title to a moiety of the garden under his purchases from Bhabatarini and Govindamohini and for partition, which suit was not defended, and the then plaintiff obtained an *ex-parte* decree under which the partition was subsequently carried into effect, and the present defendant obtained possession. With respect to the remaining moiety the defendant stated she was not in possession of it.

The Court of first instance overruled the objection of the defendant and decreed the plaintiff's suit. On appeal, the Subordinate Judge of 24-Perganas dismissed the suit, holding that it was barred by the operation of s. 13 of the Civil Procedure Code.

Babu Golap Chandra Sarkar for the appellant.

Dr. Ashutosh Mookerjee for the respondent.

HILL AND BRETT JJ. By this suit the plaintiff sought to recover possession of a parcel of garden land.

His case was, that the garden had belonged to his father and uncle in moieties and that on the death of his father he as his heir became entitled to one moiety. The other moiety descended on

the death of the uncle to the two sons of the latter, Kalikamal and Nilkamal. On the death of Kalikamal, his widow Trailokyamohini succeeded to his one-fourth share, and when she died it passed to Gobindamohini, Kalikamal's mother. On the death of Nilkamal his widow Bhabatarini took the remaining one-fourth share as his heiress. Bhabatarini and Gobindamohini both died childless, the former in November 1888, and the latter in November 1894, leaving the plaintiff the sole reversionary heir of their respective estates. On the 8th January 1888 the defendant's husband purchased from Bhabatarini her one-fourth share in the garden, and on the 4th June 1890 he purchased from Gobindamohini her one-fourth share. Subsequently the defendant, her husband having died in the meantime, possessed herself of the whole of the garden, and the plaintiff now sued to have his title to the garden declared, to have the sale to the defendant's husband set aside as having been made without legal necessity, and to recover possession. The defence, as far as it is now material, was that the suit as regards a moiety of the land was barred by the operation of section 13 of the Code of Civil Procedure. This plea was founded on a suit brought by the defendant's husband against the present plaintiff in the year 1895 for a declaration of his title to a moiety of the garden under his purchases from Bhabatarini and Gobindamohini and for partition. The suit was not defended, and the then plaintiff obtained a decree *ex parte* under which the partition was subsequently carried into effect, and the present defendant obtained possession. With respect to the remaining moiety the defendant states that she is not in possession and lays no claim to it.

The question for decision now is, whether the validity of the sales under which the defendant claims can be enquired into in the present suit, and that question appears to us to depend on whether it was incumbent on the present plaintiff in the suit of 1895 to contest the title of the defendant's predecessor on the ground which he now seeks to take, namely, that the sales to him were not supported by legal necessity.

It was contended for the appellant, that it was not necessary in that suit to go into the question of the then plaintiff's title at all, that the mere fact of joint possession gives a right to claim

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partition, and that the appellant, therefore, by abstaining from raising the question of title in the former suit, did not lose his right to raise it now. The case of *Sundar v. Parbati*(1) was claimed as an authority for these propositions; but in that case the widows of Baldeo Sahai, whose rights and interests in the property were of precisely the same nature, were the sole claimants, and there was accordingly no question as between them and the rightful owner of the property. Here, however, it is otherwise, for if the appellant be right, he alone was entitled to the property now in suit and the defendant's husband had no title to it whatever; so that unless the case referred to goes the length of deciding that a person who has no title may, on the strength merely of his being in possession, enforce a partition as against the true owner, it cannot help the appellant. It, however, we think, lends no support to that view; nor, apart from it, do we think that such a proposition is maintainable.

In our opinion the question of the validity of the sales to the defendant's husband ought to have been raised by way of defence to the partition suit, and it must, therefore, by virtue of the 2nd Explanation to section 13 of the Code of Civil Procedure, be treated as having been directly and substantially in issue in that suit. It is, consequently, we think on the principle of *Mahabir Pershad Singh v. Macnaghten*(2) and *Kameswar Pershad v. Rajkumar Ruttan Koer*(3) now *res judicata*. The result is, that the appeal fails and must be dismissed with costs.

*Appeal dismissed.*

S. C. G.

(1) (1889) I. L. R. 12 All. 51; L. R. 16 I. A. 186.

(2) (1889) I. L. R. 16 Calc. 682; L. R. 16 I. A. 107.

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