

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Zemindar of Pittapuram v. The Proprietors of the Mutta of Kolanka, from the High Court of Judicature at Madras ; delivered July 2nd, 1878.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

THIS is an appeal in a suit brought by the Plaintiff to recover possession of certain houses and grounds appertaining thereto, situate in the fort of Pittapuram, which he claimed as part of his zemindari of Pittapuram. He stated in his plaint that his father, "Sri Raja Row (late) Venkata Surya Row Bahadur, and the Defendants' father, Sri Rajah Row (late) Kumara Venkata Row Bahadur, were brothers, of whom the Plaintiff's father, who was elder, succeeded to the ancient zemindary of Pittapuram belonging to their father, Sri Rajah (late) Niladri Row Bahadur; and after him the Plaintiff became his successor." He further said, "As the Plaintiff's paternal grandmother, Sri Raja Row (late) Bhavayamma Garu, was a member of the Plaintiff's family, she lived in some of the houses within the fort of Pittapuram belonging to the Plaintiff, and had in her use some grounds appertaining to that fort; and while so she died on the 11th March 1870. The Defendants retained the said houses and grounds in their possession even after her death, on the ground of their having occupied them with her until her death; and although the Plaintiff demanded them to surrender

“ them up to the Plaintiff in July 1870, they  
“ have not done so yet; and therefore the cause  
“ of action arose in that month.”

The Defendants, in their written statement, set up in defence that the claim was barred by the Statute of Limitations; and, further, they stated that they were entitled to the property in dispute, and that the Plaintiff had no right to recover the same on the pretext that the property formed a part of his zemindari. In paragraph 3 they said, “ The Plaintiff brought the suit No. 4  
“ of 1862 on the file of the late Civil Court  
“ against the Defendant’s father, and others, for  
“ a decree establishing his right to these houses  
“ and other property; and the said suit having  
“ been dismissed, he has now again brought  
“ this suit for the said houses; and this suit  
“ is therefore opposed to section 2 of the Code  
“ of Civil Procedure.” Upon that an issue was raised whether the Plaintiff was barred under section 2 of the Civil Procedure Code from bringing the suit by reason of the cause of action or any part thereof having been previously heard and determined by a court of competent jurisdiction in a former suit between the same parties or parties under whom they claim.

The principal question in this appeal is, whether the right to recover the property in suit was determined in a former suit, and whether, as regards that property, it was a suit between the same parties or parties under whom they claim.

The former suit was brought in 1862 against the widow of Niladri Row, the grandfather of the Plaintiff, and also against the father of the Defendants and the sister of their father.

The grounds were, first, that the widow had misappropriated certain moveable property belonging to the estate of her deceased

husband Niladri, and had with part of the proceeds thereof purchased certain muttas described in No. 1 of the particulars annexed to the plaint, and had alienated the same to the co-Defendants by deed of gift; secondly, that the lands described in No. 2 of the said particulars were sree lands to which she was entitled only for life by way of maintenance, but that she had executed a document transferring them to the co-Defendants as a gift.

There was also another item in the particulars, No. 3, described as "An upstairs house situated within the fort of Pittapuram belonging to the Plaintiff, and valued at 4,000 rupees, together with three houses attached thereto, as well as a yard and compound."

There is no doubt as to the fact that the property mentioned in No. 3 is the same property as that which is now sought to be recovered. As regards the properties described as Nos. 1 and 2, the Plaintiff sought, amongst other things, to have the deeds of gift cancelled, to recover possession of No. 1, and for a prohibition against the alienation of property No. 2. As regards the property described in No. 3, and which was sought to be recovered in the present suit, there was no distinct allegation of fact either in the plaint or in the written statement, nor anything to connect the present Defendants' father therewith, or to disclose any claim thereto on the part of the Plaintiff; and their Lordships have come to the conclusion that substantially the relief sought in respect of it was, as stated by the High Court, to restrain the widow from acts of waste.—Record 303.

As regards Nos. 1 and 2, which are not the subject of the present suit, they had been assigned by the widow to the co-Defendants, who, of course, were interested in them, and necessary parties to the suit; but as regards the

houses and other property the subject of the present suit there was no charge that she had ever assigned or that she intended to assign them to the co-Defendants, nor any allegation to show that the co-Defendants had any interest whatever in them.

As regards that portion of the property, then, to which this suit relates, and as to which the High Court considered the former suit was one to restrain waste, the widow was substantially the only Defendant, and her co-Defendants were no parties to the suit.

No issue was raised nor any evidence offered on either side in respect of that part of the property, either to show that the Plaintiff was entitled to an injunction or for any other purpose, and the Plaintiff's suit was dismissed. The High Court, on appeal, affirmed the judgment. They said, "The judgment must be affirmed with respect to the houses and premises described as No. 3, there being no evidence whatever relating to this head of claim." Under these circumstances their Lordships are of opinion that the decision in the former suit was not a decision in a suit between the same parties or parties under whom they claim establishing the right of the Defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.

The issue as to *res judicata*, however, was not the only issue in the present suit; other issues were raised. The first was, "Whether the houses and sites claimed appertain to the zemindary, and, as such, are the property of the Plaintiff, the zemindar, or are the property of the Defendants." The Judge of the first Court did not determine that issue. He said, "I find in the affirmative on the fourth issue" (that is, the issue as to *res judicata*); "and with the evidence

“ before me, under which I hold the Plaintiff  
“ estopped from bringing this suit, I could not  
“ but find, were it necessary to record a finding,  
“ against the Plaintiff on the first issue.” As  
regards the estoppel, the same principle which  
applies to *res judicata* must apply to that; the  
parties were not bound by the estoppel, inasmuch  
as the former suit was not substantially as  
regards the houses and property in the present  
suit, a suit between the same parties, nor was  
there in it a claim or a decision as to the right.

There was also another issue, namely, whether  
the suit is barred by limitation. As regards  
that issue the Judge of the first Court, in para-  
graph 15 of his judgment, page 288, says:  
“ To sum up, I find that the grandmother of the  
“ Defendants, and her son, and afterwards her  
“ son’s sons, lived together in the premises now  
“ sued for as their principal place of residence.  
“ not only from 1835, as stated by the Defen-  
“ dants, nor from 1845, as stated by the Plaintiff.  
“ but the grandmother and her son lived there  
“ from and before the death of Niladri Row in  
“ 1828, and continuously, with but few breaks or  
“ visits at times.” There is, however, no express  
finding as to the title under which the mother  
remained in possession. If the houses were  
part of the zemindari which descended to the  
Plaintiff, it would be important to ascertain  
whether the mother remained in possession by  
reason of an agreement or other arrangement  
by which she was to be allowed to remain there  
for her life as her place of residence, or whether  
she continued there as a trespasser holding  
the property as in her own right. There has  
been no finding upon that point, and therefore  
it will be necessary to have it determined. If  
she held in her own right or as a trespasser,  
then the Statute of Limitation would be a bar,  
but if she held under an arrangement by which

she was allowed to remain there for her life, the occupation during her life would not be a bar to the present suit; inasmuch as she died within the period of limitation.

As regards the first and second issues, therefore, their Lordships think that under all the circumstances the case ought to be remanded to the High Court to determine them, and this more especially, as the Respondents are not present to argue the case upon the evidence.

Under these circumstances their Lordships will humbly advise Her Majesty that the finding upon the fourth issue be set aside, and the decree of the High Court be reversed, and that the case be remitted to the High Court to determine the first and second issues, and to decide the case upon the merits.

The costs of this Appeal will be taxed here, and are to be costs in the cause.