

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 451 of 1872.*1873.
June 27.MAKTUM VALAD MOHIDIN *Appellant.*IMA'M VALAD MOHIDIN *Respondent.**Res Judicata—Sec. 2 of Act VIII. of 1859.*

If the plaintiff's present cause of action might and ought properly to have been made a ground of defence in a former suit, brought against him by the defendant, his suit is barred by Section 2 of Act VIII. of 1859.

The father of A and B having died, A, alleging that his father's assets amounted in value to Rs. 12,000, and admitting that he (A) had received Rs. 1,000 part thereof, in 1866 sued B, whom he alleged to be in possession of the rest of the property, for Rs. 5,000 as the residue of A's share, and obtained a decree for a half share in immoveable property of their father of the value of about Rs. 700 and no more. In 1871 B sued A for a moiety of the Rs. 1,000, which A, in his suit in 1866, had admitted to be in his possession.

Held that such a suit could not be maintained, as the claim on which it was founded must be deemed a *res judicata* in A's suit in 1866.

THIS was a special appeal from the decision of M. B. Baker, Senior Assistant Judge, F. P., of Belgám, at Kaládgi, in Appeal No. 72 of 1872, confirming the decree of the Subordinate Judge of BÍjápúr.

The facts of the case are briefly these :—

The special appellant, Maktum, and special respondent, Imám, are Muhamadan brothers. In 1864 Maktum sued Imám to recover a share of the family property or damages agreed to be given in a deed of partition, alleged to have been dated 1854, when the father of the parties was living. This suit was rejected, the partition deed set up not having been proved. In 1866 Imám sued Maktum for a moiety of the family property, moveable and immoveable, left by their father, to the amount of about Rs 12,000. He admitted being in possession of about Rs. 1,000, and claimed Rs. 5,000 the remainder of the moiety. In this suit Imám obtained a decree for half a share in a house and two shops, worth about Rs. 700, the rest of his claim was rejected. In the year 1871, the

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suit, which forms the subject of the present special appeal, was filed by Maktum against Imám. In this suit Maktum claimed to recover a moiety of the property, which Imám in his suit of 1864 admitted he had been in possession of, and a moiety of certain other property which Maktum alleged Imám had fraudulently concealed.

The Court of first instance held this suit barred. The Court of appeal held that the cause of action to the plaintiff, in his suit of 1864, was the same as in the present one, although the forms of the suits were different; the partition deed in the previous suit was not the cause of the action but the evidence of it. On this ground that Court also held the plaintiff's claim barred.

The special appeal was heard by WEST and PINHEY, JJ.

Shántarám Náráyan for the appellant.

Pándurang Balibhadra for the respondent.

WEST, J. :—We are of opinion that although the decision, arrived at by the Assistant Judge, cannot be supported on the ground upon which he has placed it, yet the suit was barred by the suit of 1866, in which the present defendant, Imám, was plaintiff with the present plaintiff, Maktum, as defendant. That suit was brought after the death of their father, which occurred in 1862. Imám admitted the possession of a portion of the family estate, but sought still more. If what he sought was more than he was entitled to, Maktum might have urged that fact as a ground of defence. Either Maktum did not urge it or it was not sustained, for the judgment awarded to Imám a portion of the property that he sought. Maktum now comes forward to claim a partition, in his favour, of a portion of the same family property, on the ground that Imám holds more than his share. This was a matter which existed, if at all, at the time when the former suit was brought in 1866. Maktum had an opportunity of bringing it before the Court, and having lost that opportunity cannot now rest a new suit upon it: *Newington v. Levy (a)*. In answer to Imám's averment "You Maktum have an excess,"

(a) L. R. 6 C. P. 193.

he should have said "No; you Imám have an excess." The former decision implies that the excess was in the hands of Maktum, and he cannot now come forward on the ground that, instead of an excess, there was a deficiency. We, therefore, confirm the decree of the Court below with costs.

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Decree confirmed with costs.

[APPELLATE CRIMINAL JURISDICTION.]

REG. V. PREMJI BHAGVÁN.

July 3.

Cotton Frauds Act—Bombay Act IX. of 1863, Secs. 2 and 8—Fraudulent intent or knowledge.

To constitute the offence of offering adulterated cotton for compression under Sec. 8 of Bombay Act IX. of 1863, it is not necessary to prove that the accused had a fraudulent intention, or that he had knowledge of the cotton having been adulterated, or deteriorated, or mixed, as described in Sec. 2. of that Act.

THIS was an application for the exercise of the Court's extraordinary criminal jurisdiction. The accused Premji Bhagván was tried and convicted by the First Class Magistrate of Ahmadabad for the offence of offering adulterated cotton for compression, and sentenced to pay a fine of Rs. 25.

Bombay Act IX. of 1863, Sec. 2. :—Whoever adulterates or deteriorates cotton, by mixing therewith any seed, dirt, stones, or other foreign matter, or who fraudulently or dishonestly mixes cleaned and uncleaned cotton, commonly called cuppas, or cotton of different varieties in one bale, or who fraudulently or dishonestly, by exposing cotton to dew or by any other means, deceptively increases, or attempts to increase, the weight of the same, shall be punishable, on conviction, with imprisonment of either description for a term not exceeding twelve months, and shall also be liable to fine. All cotton so adulterated, or deteriorated, or fraudulently mixed, or deceptively increased in weight, and which has formed the subject of such a conviction, shall be confiscated.

Section 8 :—Any person offering for compression cotton adulterated, or deteriorated, or mixed, as described in Section 2, shall, on conviction, be liable to a fine not exceeding rupees one thousand, and all such cotton shall be confiscated.