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contracting, not for themselves but on behalf of principals indicated, though not named.

A presumption, it is said, arises that an agent may sue and be sued where he has not disclosed the name of his principal. "Disclose," no doubt, means to make known, and here, perhaps, there was no declaration —probably not. But the case may be supposed of the agents having contracted with the same charterers for the same ship shortly before or of the charterers to the agents' knowledge being by other means acquainted with the owners' names. In such a case a disclosure would be impossible, yet I do not think that the presumption would operate. The essential point is the knowledge, and here the name of the ship and the registry number being given, the defendants not only knew that the agents were not owners, but could immediately find out if they did not know before who the owners were. This, I think, was equivalent to actual knowledge, and actual knowledge is equivalent to disclosure, the sole object of which would be to convey such knowledge.

On the first issue I think, inconvenient as it may be, that the plaintiffs are not entitled to maintain this suit. I dismiss the suit with costs.

Attorneys for the plaintiffs.—Messrs. *Craigie, Lynch, and Owen.*
Attorneys for the defendant.—Messrs. *Hore, Conroy and Brown.*

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5 B. 589.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

KONERRAV AND ANOTHER (*Original Defendants*), *Appellants v.* GURRAV (*Original Plaintiff*), *Respondent.** [13th July, 1881.]

Hindu law—Res judicata—*Partition—Account in partition suits.*

In a previous suit between the plaintiff and the defendant, the plaintiff alleged that there had been a partition of the family property into two parcels, and, under a deed of partition drawn up at the time, claimed one of these parcels. The deed being held invalid, the suit was rejected, with [590] liberty to plaintiff to sue for a general partition. In the second suit the plaintiff prayed for a general partition as a member of an undivided Hindu family.

Held that the second suit was not *res judicata*; for, although the plaintiff *might* in the first suit have made an alternative case and prayed for a general partition in case he failed to establish the previous partition which he alleged, yet it could not be said that he ought to have done so.

Held, also, that in the case of joint enjoyment by the members of the whole family, or enjoyment by different members of different portions of the family property, the Court will not, except under special circumstances, order an account to be taken of past transactions, but will make division of the property actually existing at the date of partition: *Lakshman Dada Naik* v. *Ramchundra Dada Naik* (1) followed.

[R., 14 B. 31 (46); 17 B. 271 (278); 27 B. 379 (389); 24 C. 711=1 C.W.N. 565; 7 M. 564; 15 M. 336=2 M.L.J. 130; 32 M. 271=19 M.L.J. 70=5 M.L.T. 145; 9 C.L.J. 137=13 C.W.N. 309=3 Ind. Cas. 241; 4 P.R. 1903; Expl. & D., 25 B. 189 (192, 193); D., 19 B. 532 (536).]

THIS was an appeal against the decision of G. G. Phatak, Subordinate Judge (First Class) at Dharwar.

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* Regular Appeal No. 47 of 1880.

(1) 1 B. 561=5 B. 48.

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The plaintiff and the defendants were members of the same family, the latter being paternal nephews of the former. In 1872 the plaintiff brought a suit against the defendants to obtain a certain share of the family property specified in a document which purported to effect a division of the property into two parcels. This document was held to be invalid, and the suit was rejected by the Court of first instance and by the High Court; but liberty was given to the plaintiff to sue again if so advised, for general partition. The present suit was consequently brought in 1878. In this suit the plaintiff alleged union with the defendants, and prayed for a general partition as a member of an undivided Hindu family. He admitted having been in possession of a small portion of the family lands and a trading business, worth Rs. 25,000, which came to his hands in 1872, when his father died; expressed his willingness to give a share in the profits of the land and the business; and asked for a declaration of his right as a half sharer of the lands, *vatans*, and other property in the hands of the defendants, as well as for a half share of the mesne profits of the same from the year 1872, when the separate enjoyment of the different members of the properties in their possession commenced. The defendants, without denying the plaintiff's right, disputed the accuracy of certain items claimed, and denied their liability as to others. The Subordinate Judge declared the plaintiff entitled to a half share of most of the immoveable properties mentioned in the plaint; and giving to the defendant [591] a half share of Rs. 25,000, the value of the trading business, awarded to the plaintiff half a share in the profits of the immoveable properties which the defendants had realised from 1872. On this principle the Subordinate Judge found a balance of Rs. 10,270 due by the defendants to the plaintiff.

The defendants appealed to the High Court.

Inverarity and *Shamrav Vithal*, for the appellants.—This suit is *res judicata*. The two suits are to recover the same property: *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1). This was a Full Bench ruling, and was followed in *Bheeka Lall* v. *Bhughoo Lall* (2) by Markby and Prinsep, JJ. The Privy Council upheld this principle, and held that where a party, failing to obtain judgment for the possession of land claimed by her in her first suit as *taufir*, brought a fresh suit claiming the land as property belongs to her talook, her second suit was *res judicata*: *Woomatara Debia* v. *Unnopoorna Dassee* (3). In determining whether a suit is *res judicata* the Court will look to the substance of the previous suit rather than its form: *Devrav Krishna* v. *Halambhai* (4); *Haji Hasan Ibrahim* v. *Manckaram Kaliandas* (5), *Krishna Behari Roy* v. *Brojeswari Chowdranee* (6). The Courts have no power to reserve permission to a plaintiff to bring a fresh suit for the same matter: *Gobind Chunder Paul Chowdhry* v. *Ramkrishen Paul Chowdhry* (7). A plaintiff is bound to bring forward every ground on which he could claim: *Shivlingaya* v. *Naglingaya* (8); *Janaki Ammal* v. *Kamalathammal* (9).

Mesne profits ought not to have been awarded; at least for more than three years before the institution of the suit. The manager of a joint Hindu family is not bound to render an account: West and Buhler, 348, (2nd ed.); *Ranganmani Dasi* v. *Kashinath Dutt* (10). *Lakhsman Dada Naik* v. *Ramchandra Dada Naik* (11). For a suit to recover profits of immoveable property belonging to the plaintiff which have been wrongfully

(1) 2 C. 152. (2) 3 C. 23. (3) 11 B.L.R. (P.C.) 158. (4) 1 B. 87.
(5) 3 B. 137. (6) 2 I. A. 283. (7) 2 W. R. 297. (8) 4 B. 247.
(9) 7 M.H.C.R. 263. (10) 3 B.L.R. O.C.J. 1. (11) 1 B. 561=5 B. 48.

1881 JULY 13. — APPELLATE CIVIL. — 5 B. 589.

[592] received by the defendant, art. 109, sch. II of Act XV of 1877, provides a limitation of three years.

Manekshah Jehangirshah, for the respondent.—The objection as to the plaintiff's present suit being *res judicata* has now been taken for the first time, and should not be allowed. Even if allowed, it is not good. The cause of action is different; the relief sought is different. Section 13 of the Civil Procedure Code (X of 1877) is the law on the subject of *res judicata*, and it is as strict as that contained in s. 2 of the old Code of Civil Procedure (VIII of 1859). The ground of action in the previous suit was the alleged partition or the document then executed by the parties; in this suit partition is denied, and the union of the family is made the basis of the claim. This suit being on a different cause of action is not *res judicata*: *Bhisto Shankar Patil* v. *Ramchandra Raghunath Jahagirdar* (1). The authority of the Full Bench decision in *Deenobundhoo Chowdhry* v. *Kristomonee Dossee* is considerably weakened by the dissent of Garth, C.J. This case falls within the scope of the decision in *Chinniya Mudali* v. *Venkatachella Pillai* (2). In the present case the cause of action is not only different, but inconsistent with that of the previous suit, and it would be impossible for the plaintiff to make both of such inconsistent grounds the basis of his claim. The award of the Subordinate Judge as to mesne profits is equitable, as the defendants were in possession of the bulk of the property.

JUDGMENT.

MELVILL, J.—The first objection taken to the decree appealed against, *viz.*, that the subject-matter of the suit is *res judicata* was not raised in the Court of the first instance. We are of opinion that it cannot be sustained.

The plaint in the former suit, No. 352 of 1872, alleged that the defendants are the sons of the plaintiff's elder brother; that a bad feeling had sprung up between them and the plaintiff; that, in consequence of this bad feeling, the plaintiff's father, with a view to prevent future disputes, had made, with the consent [593] of the plaintiff and the defendants, a complete partition of the family property, and executed a *farkhat* on the 27th January, 1872, which had been duly registered; that on the 2nd May, 1872, the plaintiff's father had died, and thereupon the family *vatan* and other property had been entered in the names of the defendants, who had been since enjoying it. The moveable property had, the plaint alleged, been reduced into possession; and the suit was brought to obtain possession of the share which had been allotted to the plaintiff in the partition made by his father. The plaintiff expressed his willingness to take either of the two shares into which the property had been divided by his father, but insisted that there had been a valid and binding partition, to which effect ought to be given; and he refused to adopt a suggestion made during the course of the suit by the Subordinate Judge, that he should amend his plaint, and claim a general partition, without reference to the *farkhat* executed by his father.

The Subordinate Judge found that the said *farkhat* had not been executed with the consent of the defendants, and that they were, consequently, not bound by it. He, therefore, rejected the plaintiff's claim, but stated that he did so "without prejudice to his bringing a fresh claim

(1) 8 B.H.C.R. 89. (2) 3 M.H.C.R. 320.

on proper and equitable grounds for a general partition of the moveable and immoveable common family property."

This decree, which was dated the 11th October, 1875, was confirmed by the High Court on the 19th September, 1877.

The plaintiff, having thus failed to make out his claim to a certain specified portion of the family property on the footing of a partition already made by his father, has brought the present action, in which he asks that a general partition may be made in the ordinary manner between the defendants and himself, as members of an undivided Hindu family.

Several cases have been cited to us, (and especially the Calcutta Full Bench case *Denobundhoo Chowdhry* v. *Kristomonee Dossee*(1),) in which it has been held, though not without some conflict of opinion, that a claimant, who has failed to recover property under one title, cannot bring a second suit to recover the same [594] property by a different title. Assuming that that proposition is established, none of the authorities will carry us so far as we are asked to go in the present case. In the suit No. 352 of 1872 the plaintiff's case was that there had already been a valid partition of the property into two parcels, A and B, and he asked that either A or B might be awarded to him. In the present suit his case is that there has been no partition, and he seeks to recover, not A, nor B, but such portion of both A and B as may fall to his share upon a general partition. It appears to us that not only is the cause of action in the two cases not the same, but the relief sought is essentially different; and no authority has been cited to us which would require us to hold that a person, who has failed to recover one property under one title, cannot sue to recover another property under a different title.

The rule of *res judicata*, by which our Courts are to be guided, is now contained in s. 13 of Act X of 1877. It is clear that the matter at issue in the present case was not heard and finally decided in the former suit, unless it be held that it was constructively in issue in the former suit by reason of the provisions of Explanation II to the s. 13, which enacts that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It is possible that the plaintiff might, in his former suit, have made an alternative case and have prayed that if the Court should come to the conclusion that the title which he set up was a bad one, and that he was not entitled to the relief which he claimed, it should nevertheless award to him a different relief, founded upon a different and antagonistic cause of action. The plaintiff might, we say, possibly have been allowed to combine two such grounds of attack in one suit; but we cannot say that he ought to have done so. The injustice and inconvenience of insisting on such a procedure are very clearly pointed out by Garth, C.J., at p. 162 of the report of the Full Bench case already referred to. *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1).

Being of opinion that the decree of the Court below cannot be attacked on the ground of *res judicata*, it only remains for us to [595] consider certain minor objections taken by the defendants to the award made against them.

They contend that in a suit for partition between members of an undivided Hindu family, who are in possession and enjoyment of different

(1) 2 C. 152.

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portions of the property, the plaintiff is not entitled to demand mesne profits. The ordinary rule, no doubt, is that the members of an undivided Hindu family, when making a partition, are entitled, not to an account of past transactions, but to a division of the family property actually existing at the date of partition : (*Ranganmani* v. *Kashinath* (1) ; *Lakshman Dada Naik* v. *Ramachandra Dada Naik* (2) ; West and Buhler, p. 348). Where one member of the family has been entirely excluded from the enjoyment of the property, there might be good grounds for ordering an account: but in the ordinary case of joint enjoyment by the members of the whole property, or of enjoyment by different members of different portions of the property, the taking of an account would be most difficult and unsatisfactory, and we are not aware of any case in which the Courts have ever ordered it. There seems to us to be nothing in the circumstances of the present case which should induce us to depart from the ordinary rule. It is true that since the death of the plaintiff's father in 1872 the defendants have been in possession of the greater part of the immoveable property ; but the moveable property fell into the hands of the plaintiff. The Subordinate Judge has found that a money-lending business of the value of Rs. 25,000, came into the plaintiff's hands, and, in the absence of evidence as to the present state of the business, has awarded to the defendants one-half of that sum, or Rs. 12,500. This may be a fair estimate of the present value of the business; but since 1872 the plaintiff must have been living by his trade, as the defendants have been living on their land and allowances ; and if the defendants are to be required to give to the plaintiff a half share of all that they have received from their land and allowances since 1872, the plaintiff is bound to account for all the profits which he has received from the money-lending business. It is clear from what the Subordinate Judge says of the plaintiff's conduct that no [596] satisfactory account of these profits would be forthcoming ; and in its absence it would be very inequitable to make a one-sided award of mesne profits in favour of the plaintiff. For this, if for no other reason, we think it right to adhere to the ordinary rule, that a Hindu co-parcener seeking a partition, cannot demand an account. It is open to such a co-parcener, if he is dissatisfied, to demand a partition at any moment ; and if he refrain from doing so, it is his own fault. The plaintiff might have obtained a partition many years ago if he had brought his suit in its present form, instead of setting up an invalid *farkhat*, which the Subordinate Judge described as "the offspring of intrigue and dishonesty."

We accordingly, in place of the Subordinate Judge's finding on the 20th issue that the sum of Rs. 10,270-13-9½ is due by the defendants to the plaintiff, substitute a finding that the sum of Rs. 12,500 is due by the plaintiff to the defendants.

The next objection taken to the decree is contained in paragraph (16) of the memorandum of appeal, and is the subject of the 15th issue of the Subordinate Judge. It appears that the beams, planks, and stones, to which this issue refers, are still in existence, and no reason is shown why the plaintiff should not be awarded possession of one-half of the said beams, planks and stones.

The Subordinate Judge's award of Rs. 858 on this account must accordingly be set aside, and in lieu thereof it must be decreed that the defendants do deliver to the plaintiff one-half of the beams, planks, and

(1) 3 B.L.R. O.C.J. 1.
(2) 1 B. 561 = 5 B. 48.

stones mentioned in the finding on the 15th issue, as being now in the defendants' possession, or that, if delivery be not made, they pay to the plaintiff the sum of Rs. 858.

The objection raised in the 18th paragraph of the memorandum of appeal has been relied upon, but it has not been shown to us that there is any error in the Subordinate Judge's decree in this particular.

The defendants object to the partition of the land, which was the subject of the mortgage effected by the deed, Ex. No. 127, unless the plaintiff pay to them one-half of the sum of Rs. 2,325, which they allege that they have paid for the redemption of the [597] mortgage. This is the point raised in the 19th paragraph of the memorandum of appeal. It must be presumed that the money with which the redemption was effected came out of the profit, realised from the joint property in the possession of the defendants. As we do not require the defendants to account to the plaintiff for the profits which they have realised, they cannot call upon the plaintiff to reimburse them in respect of a single item of expenditure made out of those profits.

We have now dealt with all the objections taken to the Subordinate Judge's decree at the hearing of the appeal: and we are of opinion that that decree should be amended, in respect of the findings on the 15th and 20th issues, in the manner and to the extent indicated in the preceding observations, but that in other respects the decree should be confirmed.

We think the parties should bear their own costs in appeal.

Note.—See also the case of *Shivram* v. *Narayan* (*supra* 5 B, 27). In that case both the plaintiff and the defendant had in the previous suit alleged a partition, but the Court held that no partition had taken place. It does not appear that leave to bring a fresh action was given in the case.

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5 B. 597.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Pinhey.

MOHANDAS (*Original Plaintiff*), *Appellant* v. KRISHNABAI (*Original Defendant*), *Respondent*.* [29th June, 1881.]

*Hindu law—Inheritance—*Bandhus*—Maternal uncles—Mother's sister's sons.*

Maternal uncles are included in the class of *bandhus*, and succeed in priority to mother's sister's sons.

[F., 17 B. 114 (125); R., 30 B. 431 (P.C.) = 3 A.L.J. 484 = 8 Bom. L.R. 446 = 4 C.L.J. 9 = 10 C.W.N. 802 = 16 M.L.J. 446 = 1 M.L.T. 211 = 33 I.A. 176; 36 B. 339 (341) = 14 Bom. L.R. 89 = 14 Ind. Cas. 438; 33 M. 439 (445) = 5 Ind. Cas. 280 = 20 M.L.J. 275 = 7 M.L.T. 203.]

THIS was an appeal against the decision of W. H. Newnham, Judge of the District of Poona.

The facts, in so far as they are material for the purpose of this report, are as follows:—

In the city of Poona there was a firm styled "Sakharam Manchharam," the last sole owner of which was one Liladhar. In 1864, Liladhar made a will by which he appointed two persons to be administrators to carry on the business of the firm and otherwise [598] to give effect to the provisions of his will. Liladhar died, leaving him surviving his second

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* Regular Appeal No. 55 of 1880.