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Narhar had been restored to the caste. The plaintiff himself, in the 3rd paragraph of his affidavit already mentioned, swears that Narhar died a few days after the adoption of the plaintiff. Even if he had been so restored, under pressure of the Swamariacharya, it would not detract from the weight of the act of the caste in expelling him. There is not, in our opinion, any reason to suppose that the best case that could be made for the plaintiff has not been made in the Courts below by his Brahman pleaders, and we are personally cognizant that his case on the special appeal was argued with great ability, energy and discretion by Mr. Shantaram Narayan, who stands second to no pleader at the Bar of this Court, and omited no legitimate effort to obtain success. Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representatives must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation. Whether we look to the lateness of the application or to the merits of it, we think it our duty to refuse a rule *nisi* for review.

Rule refused.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

November 15.

NILVARU (ORIGINAL PLAINTIFF), APPELLANT, *v.* NILVARU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Res judicata—Appeal—Effect of appealing against a judgment—Civil Procedure Codes, Act VIII of 1859, *Sec.* 2; *Act X of* 1877, *Sec.* 13, *Expln.* 4—*Title—Trespass—Damages.*

When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata*, and becomes *res sub judice*; and if the Appellate Court declines to decide that issue, and disposes of the case

* Second Appeal, No. 111 of 1881.

on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal.

THIS was a second appeal against the decision of J. W. Walker, Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb K. B. Kher, Subordinate Judge of Sangameshvar.

In 1872 the plaintiff brought a suit against some of the present respondents for damages caused to the plaintiff by the defendants' cutting and removing certain trees on a piece of land which the plaintiff alleged belonged to him. The Court of first instance raised two issues: first, whether the land did, as alleged, belong to the plaintiff; and, secondly, whether the alleged act of trespass had, in fact, been committed. Having found both of these in the negative, he rejected the plaintiff's claim. The plaintiff thereupon appealed, and took exception to both the findings. The Appellate Court neither raised the issue of title nor decided it, but, virtually deciding that the defendants had not done the wrong complained of, upheld the decree of the Court of first instance.

The present suit was brought in 1876. In this the plaintiff added some more members of the Nilvaru family as defendants, and claimed to recover possession of the identical piece of land which had been held not to be his by the Subordinate Judge in the previous suit. The new defendants did not oppose the plaintiff's suit, but admitted his claim; the other defendants contended that, by reason of the adverse finding in the previous suit, the question of title was *res judicata*, and that the present suit was barred. Both the Courts below allowed their contention. The plaintiff, therefore appealed to the High Court.

Manekshah Jehangirshah for the appellant.—This case was governed by section 2 of the Civil Procedure Code, Act VIII of 1859. Neither under that section nor under section 13 of the new Civil Procedure Code, Act X of 1877, is the present suit barred. The Subordinate Judge in the first suit decided the question as to the plaintiff's title to the land; but that finding was appealed against, and the plaintiff had a right that it should be revised. From the moment of the plaintiff's making the appeal it became *sub judice*. It did not, therefore, bar the present suit.

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Yashvant Vasudev Athalye for the respondents.

The judgment of the Court was delivered by

MELVILL, J.—The former suit was one for damages for trespass. The Subordinate Judge framed two issues—one relating to title, and the other to the act of trespass complained of. The Subordinate Judge found that the plaintiff had not proved his title, and that the trespass had not been committed. The plaintiff appealed on both points. The Appellate Court omitted to state the points for determination as required by law, and gave the following short and unsatisfactory judgment:— "To entitle plaintiff to damages, he must show a trespass on defendants' part. This he certainly has not done. The evidence of one witness (No. 53) is clearly not sufficient. Decree confirmed with costs." It is impossible to say that the Appellate Court decided anything more than that no act of trespass had been proved. The Court gave no decision on the question of title. We consider that when the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata*, and becomes *res sub judice;* and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal. This very clearly appears from explanation 4, section 13 of the Civil Procedure Code, Act X of 1877; and we consider that that explanation introduces no new law, but merely states the law as it previously existed.

The decrees of the lower Courts are reversed, and the case is remanded for a decision on the merits. Costs to follow the final decision.

Decree reversed.

Note.—See, also, *Gungabishen* v. *Raghonath*, I. L. R. 7 Calc. 381.