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be construed so as to agree, as far as may be, with the principles of English law on which it is admittedly based. This section 12 of itself is enough, I think, to justify the construction I have put on the Act, and the rest of the Act I think supports that view. The Act, read as a whole, does, I think, say clearly enough that probate in all cases is necessary. It follows that a Mahomedan executor cannot now claim to represent the estate until he has taken out probate.

Nor on the other point argued do I think that there has been any such recognition of the executors, as such, that the parties must not be permitted now to deny their representative character. There has been no contract, nor anything in the nature of an estoppel: the defendants are better advised as to their rights now, and there is no reason why they should not assert them. I see no reason why Moosa should be allowed time to take out probate, or how any of the parties would benefit by the suit being kept alive. I, therefore, direct that Moosa's name be removed from the record as plaintiff. Costs of the motion to be paid by Moosa.

Attorneys for the plaintiff Shaik Moosa.—Messrs. *Smith and Frere.*

Attorneys for the other plaintiffs.—Messrs. *Payne and Gilbert.*

Attorneys for the defendants.—Messrs. *Macfarlane and Edgelow.*

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

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March 8.

HARI NARAYAN BRAHME (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANPATRAV DAJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Res judicata—The Code of Civil Procedure (Act X of 1877), *Sec.* 13—*Ancestral property—Partition—Omission to insist on property being brought into hotchpot—Property out of the jurisdiction—Subsequent suit for partition.*

The three defendants G., R. and K. and their brother M., the grandfather of the plaintiff, were members of one family possessing undivided ancestral property consisting of the villages of B., P. and S., the two former being situated in the Poona Zilla, the latter in the Satara Zilla. In 1866 the three defendants (each in a separate suit) sued M. in the Poona Courts for partition of the villages of B.

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and P. They in their plaints alluded to the village of S., stating that it was their own, and not subject to partition. M. in his answer contended himself with denying the right to partition of the villages of B. and P., and made no claim, in the alternative, to a share in the ownership of S. The plaintiff, the grandson of M., now sued the defendants in the Satara Courts for partition of the village of S., contending that he was not concluded from so doing by the former proceedings in the Poona Courts.

Held that the plaintiff's claim was *res judicata*, and that his suit was concluded under the provisions of the Civil Procedure Code (Act X of 1877), sec. 13, explns. I and II.*

A member of an undivided family, using his co-parceners for partition of family property, is bound to bring into hotchpot any undivided property in his own possession, in order that there may be a complete and final partition, and cannot claim to withhold any such property on the ground that it is situated within another jurisdiction. That being so, the plaintiff's grandfather M. having neglected in the previous suit to make the exception of the village of S. a ground of defence, the judgment which followed involved the decision of every claim of title upon the cause of action, and must be taken between the parties as amounting to a positive adjudication of all such claims, including the claim to the village of S.

No doubt the rule that every partition suit shall embrace all the joint family property has been held to be subject to certain qualifications, as, for instance, where different portions of it lie in different jurisdictions, or where a portion is not available for actual partition as being in the possession of a mortgagee; but there is no authority for the proposition that a member, who sues for partition of property in the hands of the defendants, can refuse to bring into hotchpot any undivided property held by himself, on the ground that it is situated within another jurisdiction.

Subba Rau v. *Rama Rau*(1) referred to and distinguished.

THIS was an appeal from the decree of Rav Bahadur P. S. Binivale, Subordinate Judge (First Class) at Satara.

The plaintiff sued the four defendants, members of the same family with himself, to recover his eighth share of an undivided ancestral *inam* property in the Satara District consisting of the village of Saspade and some fields in the possession and manage-

* *Section* 13—No Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit in a Court of competent jurisdiction between the same parties, or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—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.

(1) 3 Mad. H. C. Rep., 376.

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ment of the defendants. Defendants Nos. 1 and 4 did not appear in the Subordinate Judge's Court. Defendants Nos. 2 and 3 put in an appearance, and contended (*inter alia*) that the suit was barred both by the law of limitation and the Code of Civil Procedure, Act X of 1877, sec. 13. The Subordinate Judge found that he had no jurisdiction to try the suit, for the following reasons :—

'"Saspade, the village in dispute, and two other villages in the Poona District, *viz.*, Bhawadi and Pangari, are the ancestral *inam* property of the plaintiff and the defendants. Defendant No. 4, Deorav, is entitled to a half share in the whole property. He has been separate from the other defendants, and is only a nominal defendant in the present action. The three remaining defendants, and the present plaintiff's deceased grandfather Martand, were natural brothers. The plaintiff, being the legal heir of the deceased Martand, sued the defendants for partition of the ancestral property. The first three defendants sued Martand in 1866 in the Subordinate Judge's Court at Poona for partition of the two villages of Bhawadi and Pangari, which were then in his possession, and obtained decrees for their respective shares. It would have been legal and proper for Martand then to have claimed that the partition should include the entire ancestral estate. But though the defendants alleged in their respective suits against Martand that they had held the village of Saspade for eighteen years, and that Martand had never received any share in the Saspade village, yet Martand did not plead that he was entitled to any share in the village of Saspade, or ask that the property of Saspade should be divided. He only alleged that the then plaintiffs had no right to claim partition in the villages of Bhawadi and Pangari. From this it is obvious that the allegations made by the then plaintiffs in their respective suits, that Martand had no right to claim partition in the Saspade property, were admitted by Martand, and it seems that it was on that ground that the Court did not interfere with respect to the division of Saspade. Had Martand pleaded that he was entitled to a share in the Saspade property, and claimed it, the Court would in the ordinary course have proceeded under section 12 of Act VIII of 1859 with respect to the village of Saspade, situated in this district

"The deceased Martand did not specifically deny what the plaintiffs alleged, and it will be seen from the evidence that Martand once in 1862 applied to the Collector of Satara to remove the name of one of them from the Government records of the village of Saspade, although he was unsuccessful. From this it is obvious that although Martand was aware, as early as 1862, of his claims in the Saspade property and tried to establish his rights to it, yet he took no measures to obtain his share when the present first three defendants sued him for their respective shares in the villages of Bhawadi and Pangari.

"Under these circumstances I am of opinion that the present plaintiff, who claims a share of the village of Saspade from the defendants as the heir of the deceased Martand, has no right to sue the defendants under section 2 of Act VIII of 1859 and section 13 of Act X of 1877, and that the Court has no jurisdiction in this suit."

The plaintiff appealed to the High Court.

Farran (with him *G. R. Kirloskar*) for the appellant.—The Court below was wrong in holding that the plaintiff's claim was *res judicata*. The rule that a co-parcener claiming partition must demand a share of the entire property belonging to the family is subject to exceptions. In the first place, the property must be available for division at the date of suit, and, in the second place, it must be within the jurisdiction of the Court in which the suit is brought. *Nanabhai Vallabhdas* v. *Nathabhai Haribhai*(1), *Trimbak Dixit* v. *Narayan Dixt*(2), *Maktum valad Mohidin* v. *Imam valad Mohidin*(3), lay down the general rule. The limitations are contained in *Narayan Babaji Dabholkar* v. *Pandurang Ramchandra Dabholkar*(4); *Subba Rau* v. *Rama Rau*(5), and *Pattaravy Muda i* v. *Audimula Mudali*(6). A plaintiff, therefore, may maintain a suit for partition of that part of the immoveable family property which is situated within the jurisdiction of the Court in which he is suing, although in respect of another part a decree of partition has already been made by another Court within whose jurisdiction that latter part lay.

(1) 7 Bom. H. C. Rep., A.C.J., 46.
(2) 11 Bom. H. C. Rep., 69.
(3) 10 Bom. H. C. Rep., 293.
(4) 12 Bom. H. C. Rep., 148.
(5) 3 Mad. H. C. Rep., 376.
(6) 5 Mad. H. C. Rep, 419.

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Inverarity (with him *Shamrav Vithal*) for respondent No. 1.—The real question is whether the defendants, being in possession of some portions of the family property, are not entitled to say that the plaintiff, or his predecessors in title, were bound to have insisted in the previous suit that they should bring such portions into hotchpot, although without the jurisdiction. That point is not touched by the decision in *Subba Rau* v. *Rama Rau*(1). *Jumoona Dassee Chowdhranee* v. *Bamasoonderee Dassee Chowdhranee*(2) is in our favour.

Ganesh Hari Patvardhan, for the other respondents, contended that the claim was time-barred.

KEMBALL, J—This is an appeal against the decree of the First Class Subordinate Judge of Satara, rejecting the plaintiff's suit on the ground that its subject-matter was *res judicata*. The claim was for the partition of the village of Saspade, alleged to be undivided ancestral property, and one of the defences raised by defendants 2 and 3 (who alone appeared) was, that there had already been decrees for the partition of some of the family property *viz.*, the villages of Bhawadi and Pangari, in suits brought by each of them separately against their deceased brother, the plaintiff's grandfather, in the Court of the Subordinate Judge at Poona, and that the plaintiff was, therefore, not entitled to prosecute his present claim.

The law of *res judicata* is contained in section 13, Act X of 1877; but the matter in issue in the present suit was obviously not heard and finally decided by the Poona Court, unless it can be said to have been constructively in issue in the former suits under the provisions of explanations I and II to section 13.

It appears that the papers of these former suits were burned in the general conflagration of the Court's records that took place some few years ago in Poona, so that the particulars of those suits are wanting; but it is apparently admitted that each of the defendants 1, 2 and 3 did bring a suit (all three suits being in all respects similar one to another), and obtain a decree against their brother Martand, *i.e.* plaintiff's grandfather, somewhere about the year 1866, for the partition of the villages above named; and a copy

(1) 3 Mad. H. C. Rep.. 376. (2) 2 Calc. W. R., 148.

of the plaint in the suit brought by one of them, Keshavra, is produced, which after enumerating the property to be divided and stating the relief sought, concludes with what is styled a "Dakhalbad clause", to the effect that he had excluded from the suit the village of Saspade in the Satara Zilla, as it was his and his brothers' (defendants 1 and 2) *inam*, and they had enjoyed the income and management of it by right of ownership for eighteen years, and also certain sites in certain other villages which were in their possession

What was the exact nature of the defence made by the plaintiff's grandfather there is nothing to show ; but it would appear from an exhibit which is a copy of the judgment in the suit, and which gives wliat purports to be a *resume* of the written statement put in by Martand, that there was no denial of the allegation in the "Dakhalbad clause" ; and although the matter then decided was only the rights of the parties in the Poona villages, it is contended for the respondent that the omission to deny the allegation as to the Satara village amounted to an implied admission of the matter so alleged, within the meaning of explanation I above referred to. For the appellant it is argued that Martand may have omitted to notice the allegation as to Saspade, in order to enable him to raise the plea of limitation, and that it is doubtful whether, having regard to section 12, Act VIII of 1859, he was bound to raise the question as to a village in another district—*Subba Rau* v. *Rama Rau*(1) and *Pattaravy Mudali* v. *Audimula Mudali*(2). But the circumstance that the village of Saspade was not within the jurisdiction of the Poona Court seem to me immaterial ; and I am of opinion that plaintiff is concluded by the decision in the former suits, whether under explanation I or explanation II.

The cause of action in the former suits (why three separate suits were permitted, is not clear) was the right of each plaintiff to have a partition of all the family property liable to partition ; and it is indisputable that, as a general rule, a member of an undivided family cannot sue his co-sharers for his share in a portion only of the family property, and that he must bring into

(1) 3 Mad. H. C. Rep., 376. (2) 5 Mad. H. C. Rep., 419.

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hotchpot any undivided property in his own possession, in order that there may be a complete and final partition.

No doubt the rule that every partition suit shall embrace all the joint family property has been held to be subject to certain qualifications, as, for instance, where different portions of it lie in different jurisdictions, or where a portion is not available for actual partition as being in the possession of a mortgagee; but I am not aware of any authority for the proposition that a member who sues for partition of property in the hands of the defendant, can refuse to bring into hotchpot any undivided property held by himself, on the ground that it is situated within another jurisdiction. It is asked, what would be the effect if the undivided property in the possession of the plaintiff were in foreign territory, but that is not the case here It is obvious that, when a plaintiff seeks to recover a share of property in the hands of the defendant, it is necessary for the Court to decide whether, under the circumstances of the case, he is entitled to that partition; and I apprehend that no Court would decide that a plaintiff who withheld property which he might, and therefore ought to bring into hotchpot, had a right to the partition of the property in the possession of the defendant. In the present case, when Keshavrav and his brothers sued the plaintiff's grandfather Martand for a share of the property in Martand's possession, the latter was bound to resist the claim upon all the grounds possible to him, and one of these grounds undoubtedly was that the then plaintiffs were in possession of undivided property which they were withholding from the general partition. The plaintiffs expressly challenged Martand with reference to the village of Saspade, and Martand having neglected to make the omission of that village a ground of defence, I think the judgment which followed involved the decision of every claim of title upon the cause of action, and must be taken between the parties as amounting to a positive adjudication of such claim. For these reasons I would confirm the decree of the Court below, with costs.

PINHEY, J.—In my opinion the Court below is right, and I would confirm its decree. It has been contended on the authority of *Subba Rau* v. *Rama Rau*(1) that the suit is maintainable

(1) 3 Mad. H. C. Rep., 376.

because the Poona Court had no jurisdiction over the village of Saspade, which is in the Satara District, and which is the subject of the present suit. Without expressing any opinion as to whether that case was rightly decided, it is very clear that it differs very much from the present case. In the Madras case the plaintiff was out of possession of property in two districts, and the Madras High Court ruled that he might sue separately in the Munsif's Court in each district, because neither Munsif's Court had jurisdiction over the property in the other district, and the plaintiff was not bound to include both properties in one suit, and apply to the High Court for sanction of the trial.

But in this case another rule of law comes in, *viz.*, that a plaintiff suing for partition must bring into hotchpot all family property in his possession. In three former suits, three of the present defendants, brethren of the present plaintiff's grandfather, sued the present plaintiff's grandfather in the Poona Court for their shares of the villages of Bhawadi and Pangari in the Poona District, stating that they were in possession of the village of Saspade in the Satara District, but that to it the present plaintiff's grandfather had no claim. Notwithstanding this statement in regard to Saspade, the present plaintiff's gandfather neither challenged it, nor did he claim any share of the village of Saspade in the event of being compelled to give to the then claimants their shares in Bhawadi and Pangari. It seems to me clear that if the present plaintiff's grandfather were entitled to any share in the village of Saspade, he was bound to assert his claim to it when sued for a partition of family property in the suits in the Poona Court, and the grandfather having failed to assert his claim then, I am of opinion that plaintiff cannot now make it the subject of a fresh suit.