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Before Mr. Justice Jardine and Mr. Justice Candy.

THAKORE BECHARJI RANAJI AND OTHERS (*Original Defendants*), *Appellants v.* THAKORE PUJAJI VAKTAJI, DECEASED, BY HIS HEIRS HARISANGJI AND OTHERS, (*Original Plaintiffs*), *Respondents.** [10th April, 1889.]

Res judicata—*First suit based on the general right of a co-parcener to claim partition of the joint estate—Refusal of Judge in first suit to allow plaint to be amended so as to include claim to partition based on an award—Second suit based on an award—Code of Civil Procedure (Act XIV of 1882), s. 13, expl. s. I and II.*

In 1874 the plaintiffs' father filed a suit against the defendants for partition of joint family property. The subject-matter of the suit was referred to arbitration out of Court. The arbitrators made an award to the effect that partition should be postponed till the family debts were paid off. The award was accepted by all the sharers, and so the plaintiffs' father withdrew his suit.

In 1880 the debts were paid off. Thereupon the plaintiffs' father demanded partition, but was refused. He, therefore, filed a partition suit in 1883 against the defendants. In his plaint he made no mention of the award of 1874, but relied on his right as a co-parcener to enforce partition. After the settlement of issues he applied for amendment of the plaint, so as to include his claim on the award. The Court refused the amendment, on the ground that it would materially alter the character of the suit, and dismissed the suit, as barred under s. 373 of the Code of Civil Procedure (Act XIV of 1882.)

Against this decision plaintiffs' father did not appeal. In 1884 the plaintiffs filed the present suit for partition, relying expressly on their title under the award of 1874.

Held, that the suit was not barred by the plea of *res judicata*.

[R., 20 B. 86 (91); 11 Bom.L.R. 46 (48); 10 C.W.N. 839; U.B.R. (1897—1901) 284; D., 25 B. 115; 10 O.C. 44 (47).]

APPEAL from the decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Ahmedabad, in suit No. 1119 of 1884.

This was a suit for partition of joint ancestral property, consisting of five villages comprised in the *talukdari* estate of Ukardi.

The common ancestor of the parties was one Govindji who had two sons—Chandaji and Durgaji. The plaintiffs were descended from Chandaji, and the defendants from Durgaji.

In 1874 the plaintiffs' father Pujaji filed a suit (No. 45 of 1874) against the defendants for a declaration of his right to a 50 *dokdas'* share in the property in dispute. The subject-matter of this suit was referred to arbitration out of Court. On 22nd October, 1874, the arbitrators made an award to the effect that [32] partition should be postponed till the ancestral debts were paid off, and that in the meantime the sharers should be allotted each a small parcel of land out of the *taluka* for his maintenance.

The award was accepted by the sharers, and Pujaji was put in possession of 8½ *sathis* of land in lieu of maintenance.

In pursuance of this arrangement Pujaji withdrew from his suit, No. 45 of 1874, on the 28th October 1874, without, however, obtaining the Court's permission under s. 97 of Act VIII of 1859.

* Appeal No. 42 of 1887.

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In 1880 the ancestral debts were all paid off. Pujaji thereupon demanded partition of the estate, but his co-sharers refused to come to a partition. He thereupon filed a suit, No. 61 of 1883, to enforce his right to partition. In his plaint he did not refer to the arrangement of 1874, but relied on his general right, under the Hindu law, to recover his share of the undivided ancestral property. A few days after the settlement of issues, Pujaji applied for leave to amend his plaint so as to base his title on the award of 1874. The Subordinate Judge rejected this application, first on the ground that it was made too late, and secondly on the ground that the amendment, if allowed, would change the whole character of the suit. He remarked: "If the plaintiff is now entitled to any relief, it must be on a cause of action arising out of the compromise thus effected, but this has evidently not been done. Plaintiff Pujaji presented a written statement in amendment of the plaint, but this was given six days after the settlement of issues, and was not, therefore, receivable under s. 112 of the Code of Civil Proce ure.....But even if it be supposed that no such objection exists, the written statement in question is not admissible, as it changes the whole foundation and character of the suit".

Accordingly the Subordinate Judge dismissed the suit, holding that, in so far as it was not based on the settlement which resulted in the withdrawal of the suit of 1874, it was barred by s. 373 of the Code of Civil Procedure.

Pujaji did not appeal from this decision. His sons filed the present suit for partition in 1884, relying expressly on their title on the award of 1874.

[33] The defendants pleaded (*inter alia*) that the suit was barred under ss. 43 and 373 of the Code of Civil Procedure (Act XIV of 1882).

The Subordinate Judge overruled these objections, and awarded the plaintiffs' claim.

Against this decision the defendants appealed to the High Court.

Starling (with him *Bhaishankar and Dinsha*), for appellants.

Branson (with him *Gokaldas Kahandas Parikh*), for respondents.

The following authorities were referred to in argument:—*Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1); *Triloki Nath Singh* v. *Pertab Narain Singh* (2; *Rajah of Pittapur* v. *Sri Rajah Venkata Mahipati Surya* (3); *Girdhar Manordas* v. *Dayabhai Kalabhai* (4); *Nilo Ramchndra* v. *Govind Ballal* (5); *Karim Mahomed Jamal* v. *Rajooma* (6).

The following judgments were delivered by the Court:—

JUDGMENTS.

JARDINE, J.—This suit was brought by the sons of Pujaji for partition of joint family property. To understand the questions of *res judicata* and of the effect of ss. 43 and 373 of the Code of Civil Procedure raised in the suit and in the appeal, it is necessary to state the earlier litigation. The following facts are admitted.

Plaintiffs' father brought a suit, No. 45 of 1874, against the present defendants, or those under whom they claim, for a declaration of his right to a half share of the same family property. On the 28th October, 1874,

(1) 2 C. 152. (2) 15 C. 808. (3) 12 I. A. 116.
(4) 8 B. 174. (5) 10 B. 24. (6) 12 B. 174.

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he withdrew that suit, without any leave of the Court given under s. 97 of Act VIII of 1859.

Plaintiffs' father brought another suit against the same parties, No. 61 of 1883, for a half share of the same property. On the 16th June, 1884, the Subordinate Judge recorded a judgment on issues, rejecting the claim. No appeal was made.

The Subordinate Judge found in the affirmative on the issue whether the suit was barred by s. 373 of Act XIV of 1882. [34] He held that as the suit of 1874 had been withdrawn without the permission of the Court, the suit then before him could not be entertained. The Subordinate Judge in his reasons for this finding deals with some allegations of the then plaintiff Pujaji which had been made in the course of the suit, but which did not appear in the plaint. After the settlement of issues, Pujaji alleged that the suit of 1874 was withdrawn in consequence of a compromise arranged by Mr. Richey, the Talukdari Settlement Officer, and he wished to have the plaint amended so as to have his right to the partition on that compromise. The Subordinate Judge refused, on the ground that the amendment would change the whole foundation and character of the suit, which he held to be based on the same cause of action substantially as that of 1874. The plaintiff had also argued that as the compromise had not been acted upon, he was restored to his original right of action. The Subordinate Judge confined plaintiff to the title put forth in his plaint, *i. e.*, the ordinary right of a member of a Hindu family to a share in undivided joint property, and refused to allow him to change to the title not mentioned in the plaint, *viz.*, the same rights modified by the compromise which had been put in the form of an award, confirmed after some litigation by the High Court.

It appears, then, that the Subordinate Judge so dealt with the pleadings as to prevent plaintiff raising the question, which was decided affirmatively in *Juggobundo* v. *Watson* (1), and *Kallynauth Shaw* v. *Rajeeblochan Mozoomdar* (2), *viz.*, that the withdrawal of a suit without leave did not prevent a plaintiff suing to enforce the agreement to compromise; see Broughton's Code of Civil Procedure of 1877, pp. 509 and 590.

It is to be noted that the plaintiff did not apply to withdraw the suit of 1883 with liberty to bring a fresh suit. See *Watson* v. *Collector of Rajshahye* (3) and *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (4).

In 1884 the present suit was brought for a half share; the plaint makes mention of the right at Hindu law and the arrangement embodied in the award. It does not appear that [35] the circumstances about the award had altered in the interval between the suits of 1883 and 1884: the suit of 1883 might apparently have been brought on a plaint substantially similar to that filed in 1884. The question, then, which we have to decide is whether the present suit is barred by the proceedings of the suit of 1883. It has been argued that the judgment in that suit creates an estoppel.

The Court below has not discussed this question at length. The Subordinate Judge observes: "The present suit is brought in the amended form suggested by the judgment in the former suit." The plaint contains the allegations which in the suit of 1883 the Court refused to allow to be inserted as amendments. The Subordinate Judge is of opinion that

(1) 2 Bourke, 250.
(2) 2 Ind. Jur. N.S. 343.
(3) 13 M.I.A. 160.
(4) 11 M.I.A. 551 (604).

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s. 43 constitutes no bar; and as to s. 373 he holds the same, "as the cause of action is different from that alleged in the suit of 1874." But he does not consider the question with which we have to deal, which depends on s. 13 of the Code of Civil Procedure, and especially on Expls. 1 and 2.

The plaintiff asks for the very same relief as in the suit of 1883. The property now in dispute was the subject of the two earlier suits: thus there is identity of subject-matter—*Woomatara Debia* v. *Unnopoorna Dassee* (1) and *Lakshman Bhatkar* v. *Babaji Bhatkar* (2). I am inclined to think that in this suit and that of 1883 the cause of action, *i.e.*, the wrongful withholding of the property and refusal to come to partition, is the same: the Court must look to the substance of the action rather than the form—*Soorjomonee Dayee* v. *Saddanund Mohapatter* (3) and *Thakur Shankar Baksh* v. *Dya Shankar* (4).

The present suit would thus appear to be one to which the rule of *res judicata* ought to apply upon both the grounds, for it is stated by Lord Blackburn in *Lockyer* v. *Ferryman* (5), "the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same [36] cause." The same learned Judge said in *Newington* v. *Levy* (6): "I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But, if there be matter subsequent which could not have been brought before the Court at the time, the party is not estopped from raising it." In the present suit there is not shown to be any matter subsequent to the facts as they existed when the suit of 1883 was brought. The case thus resembles *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (7), in which the majority of a Full Bench interpret the judgment of the Judicial Committee of the Privy Council in *Woomatara Debia* v. *Unncopoorna Dassee*(1) as authority for applying the rule of *res judicata* to such cases. If the view taken by the majority of the Full Bench of the doctrine laid down by their Lordships of the Privy Council is correct, we are bound to follow it. But the Calcutta case has been dissented from by the High Court of Madras—*Thyila Kandi Ummatha* v. *Thyila Kandi Cheria*(8).

In this High Court the doctrine laid down by Lord Westbury in *Hunter* v. *Stewart* (9) has been pretty consistently followed—*Girdhar Manordas* v. *Dayabhai Kalabhai*(10). The present case may, in my opinion, be distinguished on the ground that there has been only one alleged infringement of right on the part of defendants. In *Haji Hasam Ibrahim* v. *Mancharam Kaliandas* (11) and in *Naro Hari* v. *Anpurnabhai* (12) the subject is discussed. The following rule is laid down.—"While the authority of *Hunter* v. *Stewart*(9) is fully admitted, it is recognized, also, that the cause of action may be the same, though the form of action on the second occasion is different; and the cause of 'action,' it is said, 'is to be regarded as the same if it rests on facts which are integrally connected with those upon which a right and an infringement of the right

(1) 11 B.L.R. 158 (166). (2) 8 B. 31. (3) I.A. Sup. Vol. 212.
(4) 15 I.A. 66=15 C. 422. (5) L. R. 2 Ap. Ca. 519 (530).
(6) L.R. 6 C.P. 180 (193). (7) 2 C 152. (8) 4 M. 308.
(9) 32 L.J. Ch. 346. (10) 8 B. 174. (11) 3 B. 137 (139, 140).
(12) Printed Judgments for 1874, p. 218

have already been once asserted as a ground for the Court's interference." Mr. Justice West also [37] said (at p. 140) "the facts are connected in an essential jural unity, so that, had the plaintiffs' whole case been brought forward before, it would not have involved separate investigations." This remark appears to me applicable to the present plaintiff's case. Pujaji might and ought to have alleged the existence of the compromise in his pleadings in the suit of 1883 and at the proper time: when he did allege them after the issues had been settled, the Subordinate Judge considered them to be out of time, and such as would change the whole character of the suit. But so far as I am able to judge on the materials before us, Pujaji was right in his endeavour to get the compromise dealt with in the suit of 1883. I am disposed, therefore, to hold that whether the strict rule of *res judicata* adopted in *Denobundhoo* v. *Krishtomonee* (see Markby, J.'s judgment) or the wider rule asserted in *Chinniya Mudali* v. *Venkatachella Pillai* (1) be followed, the matter of the present suit is the same as that of the suit of 1883.

We have, however, to determine whether the refusal of the Subordinate Judge who tried the suit of 1883 to adjudicate on the title of Pujaji under the compromise takes the present suit out of the operation of the ordinary rule. The circumstances of the refusal are stated in his judgment, and the facts are not disputed. He wrote: "If, therefore, plaintiff is now entitled to any relief it must be sought on a cause of action arising out of the compromise thus effected, but this has evidently not been done. Plaintiff Pujaji presented a written statement in amendment of the plaint, but this was given six days after the setttlement of issues, and was not, therefore, receivable under s. 112 of the Code of Civil Procedure." The Subordinate Judge lays some stress on the fact that Pujaji might easily have made mention of the compromise in the plaint in the suit of 1883 which he had not done. He refused to allow the amendment, on the ground that the application was made out of time; and added: "But even if it be supposed that no such objection exists, the written statement in question is not admissible, as it changes the whole foundation and character of the suit."

[38] The Subordinate Judge's decree was not appealed from by any party. If, then, we have to treat this part of his judgment as binding on the parties, we would have to hold, following the construction put on the decisions of the Judicial Committee of the Privy Council by this Court in *Haji Hasam Ibrahim* v. *Mancharam Kaliandas* (2) and *Girdhar Manordas* v. *Dayabhai Kalabhai* (3), that there is no estoppel by *res judicata*, the facts in the two causes of action not being integrally connected and the infringements of right being different in the two suits. This course would not, I think, be contrary to judicial principle, as the judgment in the suit of 1883 was evidently passed after full argument of the question whether the causes of action shown in the plaint and in the application for amendment were distinct or identical. It is open to us, however, to look at the present case on the assumption that the Subordinate Judge who refused to allow the amendment was wrong. The present claim is not for a relief different to that demanded in 1883: and therefore the reasoning of Stuart, C.J., in *Sarsuti* v. *Kunj Behari Lal* (4), where the objections to allowing a fresh suit are stated, does not appear to me to apply fully. I doubt whether from Pujaji's omission to move the High Court under s. 622 or

(1) 3 M. H. C. R. 320.
(2) 3 B. 137.
(3) 8 B. 174.
(4) 5 A. 345 (356).

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to appeal from the decree, " he must be taken to have deliberately and advisedly acquiesced in the refusal of his application—an acquiescence which it might fairly be argued was tantamount to an admission " that the only title on which he could sue was that alleged in his plaint of 1883.

In the view I take of that suit I am inclined to think that the order refusing amendment was a mistake. I must express myself with diffidence, as the Subordinate Judge had the parties before him and heard their arguments. But nothing has been shown to induce us to suppose that the compromise made any substantial alteration in Pujaji's right to partition as an undivided member of the family: and I incline, therefore, to hold that the amendment sought would not have converted the suit into a suit of another and inconsistent character—*Damodar Madhowji* v. *Purmanandas Jeewandas*(1) and that it might, therefore, have [39] been allowed at the time when the application was made, for the reasons given by Westropp, C. J., in *R. and N. Modhe* v. *S. Dongre*(2) and by Stuart, C. J., in *Sarsuti* v. *Kunj Behari Lal*(3). I am disposed to treat the acquiescence of Pujaji as in somewhat similar circumstances that of a plaintiff was treated by Stuart, C.J., in *Babu Lal* v. *Ishri Prasad Narain Singh* (4). and by Garth, C. J., in *Ram Charan Buhardar* v. *Reazuddin* (5). In those cases the Courts which had tried the first of the two suits under consideration had indeed suggested to plaintiff to bring a fresh suit, and the plaintiff's conduct in so doing rather than appealing was treated by the High Courts as reasonable submission to the Court. In the case before us no such suggestion was made by the Subordinate Judge who decided the suit of 1883. But plaintiffs' conduct in bringing the present suit on the compromise is much the same: and the above two cases are authorities for the position that in such circumstances the rule of *res judicata* cannot be applied with justice. They ar express interpretations of s. 13 of the Code of Civil Procedure. " The law as to estoppel by a judgment is stated in s. 6 of Act XII of 1879 and s. 13 of Act XIV of 1882. It is that the matter must have been directly and substantially in issue in the former suit and have been heard and finally decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at"—*Kali Krishna Tagore* v. *Secretary of State for India* (6). What Sir R. Garth says in the Calcutta case quoted above appears to me applicable: " We are not prepared to say that the course taken by those Courts was *ultra vires*. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause; and it is clear that a question, which was advisedly left undecided in the former suit, cannot be said to have been heard and finally decided within the meaning of s. 13 of the Code"(5). This was the ground taken by Scotland, C. J., in *Chinniya Mudali* v. *Venkatachala* [40] *Pillai* (7) and *per* Sir B. Peacock in *Tekait Doorga Parsad Singh* v. *Tekaitni Doorga Konwari* (8).

I am, therefore, of opinion, though not without some doubt, that the condition of *res judicata* stated in Expl. 2 to s. 13 does exist; and that the condition stated in Expl. I does not exist, and that, therefore, there is no estoppel by *res judicata*.

For these reasons I think the decree should be confirmed with costs.

(1) 7 B. 155. (2) 5 B. 609. (3) 5 A. 345.
(4) 2 A. 582 (586). (5) 10 C. 856 (860).
(6) 15 I. A., 186 (193)=16 C. 173 (182, 183). (7) 3 M. H. C. R. 320.
(8) 5 I. A. 149 (155).

CANDY, J.—The parties in this case are sharers in the *talukdari* estate of Ukhardi, in Ahmedabad district. Plaintiffs are sons of one Pujaji, who, they say, enjoyed his half-share of the profits of the undivided estate up to 1864.

On 7th January, 1864, the management of the taluka was vested in the Talukdari Settlement Officer under Bombay Act VI of 1862. That management expired on 9th September, 1869; but the estate still remained in the hands of the Talukdari Settlement Officer, for the sons of Ranaji, the registered holders of the estate (now the principal defendants Nos. 1, 2, 3), were then minors, and the Collector was the administrator of their property, and the Talukdari Settlement Officer was the agent of the Collector for the management of the estate. While the estate was in the hands of the Talukdari Settlement Officer under the Collector, Pujaji brought suit No. 45 of 1874 against the Collector representing the sons of Ranaji, and the other shareholders, for a declaration of his half share in the estate, alleging that the Collector and the other shareholders obstructed him in taking his share of the produce. But on 28th October, 1874, Pujaji withdrew this suit. The reason why he did so is evident. Mr. Richey, the Talukdari Settlement Officer, on behalf of the then, as now, principal defendants (the registered holders of the estate) persuaded the other shareholders, including Pujaji who had filed the suit, to refer the dispute regarding their shares to the arbitration of Sheth Chandulal. The decision of the arbitrator dated 22nd October 1874 (Ex. 124), was to the following effect:—

[41] "There is some dispute amongst the shareholders of Ukhardi regarding their shares. And if during such (time) the shares were now partitioned off, the taluka would be dismembered. The following decision is, therefore, given. Out of the land of Ukhardi eleven *santis* held in common should be deducted for the village servants, expenses of guests, &c. Of the remaining lands in Ukhardi the shareholders should hold so many *santis* for maintenance. (Then follow particulars, so many *santis* to Pujaji, so many to Becharji and so on). In this manner the *santis* have been fixed with regard to the number of the members of each family. Appended is a list of debts due to the *savkars*. These should all be regarded as joint debts, which should be paid off from the produce of the remaining lands in Ukhardi and from the other villages of the estate. Until the debts are paid off, nothing should be paid to any of the shareholders. Any future debts for necessary expenses incurred by the shareholders should be paid by them out of and in proportion to the lands allowed for maintenance."

This decision or agreement in the handwriting of Chandulal was signed by Jitaji Badaji Babaji, Pujaji and Jivaji Badarji as approved by them; and on the 28th October, 1874, it was endorsed by Mr. Richey to the effect that he accepted the same on behalf of Becharji Ranaji, and had sent the surveyor to divide the lands in proportion to their *santis* (*viz.*, the land in Ukhardi allotted for maintenance). Accordingly, on the same day (28th October, 1874), Pujaji made an application (now Ex. 57) to the Court in which he had filed his suit, No. 45 of 1874, to the effect that as Mr. Richey had privately arranged an arbitration and *had effected a partition*, he had no wish to continue the suit. The suit was accordingly dismissed, plaintiff having no further cause of action. Reference also may be made to the letter (Ex. 125) which Chandulal, on 22nd October, 1874, sent to Mr. Richey forwarding his decision, in which he recites that he had

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been nominated arbitrator to decide the dispute among the shareholders *and to effect a partition.* He then recites the arrangement described above, making it clear that any future debts were to be paid by the shareholders out of the produce of the lands allotted for maintenance, and until all past debts were paid, no sharer was to receive [42] anything from the rest of the land. Also it is to be noted that in the reference to arbitration (Exs. 129, 134) executed by the shareholders the latter recited their willingness to agree to what the arbitrator *should give them.* It is thus apparent that the shareholders understood that by Chandulal's decision a partition was to be effected.

The mother of the minor sons of Ranaji objected to the decision. According to the record in the High Court of Appeal No. 3 of 1877 (under Act XX of 1864) she applied to the District Judge (under s. 18 of Act of XX of 1864) to set aside the arrangement, which in effect disallowed the monthly allowance of Rs. 25 hitherto paid to the minors, an allotment of land for maintenance having, as shown above, been made to each shareholder, on which Mr. Richey stopped the monthly cash allowance to the minor sons of Ranaji.

The District Judge (29th June, 1876,) held that "the Talukdari Settlement Officer committed a grave error in effecting the compromise without the sanction of this Court previously obtained * * * * The Court, however, is unwilling to re-open the door to endless disputes and litigation among the sharers, and considering all the circumstances, is disposed to sanction the arrangement made in regard to the minor's estate."

The mother of the minors appealed to the High Court against this order, urging that it sanctioned an illegal alienation of property. But the High Court (27th November, 1877,) confirmed the order of the District Court.

We now come to December, 1880, when the Talukdari Settlement Officer withdrew from the management of the estate, the minor shareholders having by that time attained majority. On 9th January, 1883, Pujaji filed suit No. 61 of 1883 against the present defendants for declaration of his half share in the *talukdari* estate and for possession of the same, complaining that since the Talukdari Settlement Officer had relinquished management he (Pujaji) had received no share of the revenues of the estate beyond a small portion (allotted for his maintenance). There was no express mention in that plaint of the former suit of 1874 or of the circumstances under which it had been [43] withdrawn. But these facts came out in the pleadings; and Pujaji then applied for leave to amend his plaint, but this the Subordinate Judge refused, on the ground that the application was made too late, and that it would change the nature of the suit. Accordingly, on 16th June, 1884, the Subordinate Judge rejected the claim as barred by s. 373 of Act XIV of 1882, holding that, as the suit of 1874 had been withdrawn without the permission of the Court, the claim before him, which was substantially the same as that of 1874, could not be entertained, and that if the plaintiff was entitled to any relief, it must be on a cause of action arising out of the compromise effected in 1874. No appeal was made by Pujaji against that decision, and on 15th November, 1884, the present plaintiffs, sons of Pujaji, filed the present suit to obtain possession of their one-half share in the estate, founding their claim on the arrangement made in 1874. The Subordinate Judge awarded the claim, holding that the suit was not barred by limitation, or by s. 43 or by s. 373 of the Civil Procedure Code, that the arbitration

award of 1874 was proved and valid, and that the plaintiffs were half sharers in the estate.

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In appeal to this Court it has been urged that the claim must be held barred under ss. 43 and 373 of the Civil Procedure Code and by the previous suit of 1883. The learned pleader for appellants especially relied on the case of *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1) which follow the judgment of the Privy Council in *Woomatara Debia* v. *Unnopoorna Dassee* (2) affirming the judgment of the Calcutta High Court in the same case (2).

In *Denobundhoo's Case* (1) the question referred to the Full Bench was" whether a plaintiff, who has brought a suit to recover property upon the strength of one title, and has been defeated in that suit, can bring a (second) suit to recover the same property upon the strength of another title, of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed."

The majority of Judges (Garth, C. J., *dissentiente*) answerd the question in the negative.

[44] Jackson, J., said (at pp. 173, 174, 175): "In the first suit she (the plaintiff) claimed the property in question as heir of her deceased husband. Defendant's case was that it was not property left by the deceased husband, but had been given by him in his lifetime to his daughter (the defendant's wife) who at the time of bringing the suit was dead, and that defendant held it, and was entitled to it, as the heir of that daughter, his own wife. * * * * The plaintiff, in the filing of an answer to this effect, would have been entitled to put in an application, and doubtless would have done so, if she had chosen to contest the point, to the effect that, assuming such gift, then the plaintiff, and not the defendant, was heir to the donee, and so entitled. And therefore the Court would have been bound to try as well the issue of fact as to the deed of gift, as also the further question whether if the gift was true and valid, the defendant or the plaintiff was heir. * * * The present suit, therefore, has for its purpose the raising of an issue which was triable in the former suit, but which the plaintiff then declined. * * *. If the heirship to the daughter was not in issue it was only not so because the plaintiff would not recite the issue. * * * What we have now before us is a question raised by the opponent in the first suit, and not gainsaid then."

So too Kemp, J., (at p. 173) :—"The title she now sues upon was a title which she could have set up in the first suit, as it is admitted that both her husband and her daughter were dead, and had been so for many years when she brought her first suit. If she omitted to put forward her strongest or any title then available to her and within her cognizance, 'so much the worse for her,' to use the words of Phear, J., in his decision in *Umatara Debia* v. *Krishna Kamini Dasi* (3) which decision was affirmed by the Privy Council."

And Macpherson, J., (at p. 183) :—"The question ought to have been raised in the former suit if at all, and not having been raised then, it cannot be raised in the present suit."

So here it is said :—Pujaji in his plaint of 1883 made no express mention of the arrangement of 1874, but based his claim on

(1) 2 C. 152 (154). (2) 11 B. L. R.P. C. 156.
(3) 2 B. L. R. A. C., 102 ; 11 B. L. R., 158.

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[45] his alleged general right to partition. His sons cannot, therefore, now bring a suit for partition on the strength of a title depending on the arrangement of 1874.

Now it is manifest that there are certain points distinguishing the present case from *Denobundhoo's Case*(1). It is true that Pujaji in his plaint of 1883 did not mention the agreement of 1874 and did not make that agreement the ground of his title to partition, apparently thinking that as the condition recited in the agreement (the payment of the debts) had been performed, his general right to partition revived. But he cannot be taken as having deliberately declined the question of the agreement being raised. After the fact of the agreement had been mentioned in the pleadings, Pujaji asked for permission to amend his plaint, so that the question of the agreement might be raised and tried; and though the Subordinate Judge held that the application was too late under s. 112 of the Civil Procedure Code, he did not reject it solely on that ground, but because, in his opinion, it would change the whole foundation and character of the suit, and "if plaintiff is now entitled to any relief it must be sought on a cause of action arising out of the compromise thus effected." It is thus clear that it was the Subordinate Judge who prevented the whole controversy between the parties upon the subject-matter, so far as their knowledge permitted, being then tried out and conclusively decided. This is not unlike the case of *T. K. Ummatha* v. *T. K. Cheria Kunhamed* (2) in which Innes and Muttusami Ayyar, JJ., expressed agreement with Garth, C. J., and disagreement with the other Judges in *Denobundhoo's Case* (1), in which the Munsif in the former suit had deliberately narrowed the question in issue, and this was held to be equivalent to leading the parties to suppose that the further question might, if necessary, be the subject of another trial, and, therefore, there was no bar.

A similar case is *Sadaya Pillai* v. *Chinni* (3) in which the facts are thus described:—

"In a former suit instituted by the plaintiff in 1872 he claimed the same relief as he now seeks, but on different averments. [46] While asserting, as he now asserts, that the property in suit was the joint property of himself and his uncle Paradasia Pillai, he then averred that the defendant Chinni was not the son of his uncle, and had no claim to the property. In the course of the proceedings in that suit the plaintiff produced the documents on which he now relies to prove a partition subsequently to his uncle's death, and endeavoured to obtain from the Court a decree on the strength of that partition; but it was ruled that in that suit his claim must stand or fall on the case originally set up by him, and that if he derived any title from the alleged partition, he might assert it in another suit. It being found that Chinni was the son of Paradasia Pillai, the suit was dismissed.

"To the present claim the defendants plead among other pleads that the plaintiff is estopped from maintaining this suit by the provisions of s. 2, Act VIII of 1859. This is clearly not so, because the claim he now advances has not been determined in any previous proceedings. He claimed the same property, it is true, but he based his claim or inheritance —succession by survivorship to the interest of his united uncle; that claim was enquired into and determined. He now sues on the title created by the agreement made between him and the defendants

(1) 2 C. 152. (2) 4 M. 308. (3) 2 M. 352 (354, 355).

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through their guardian subsequently to the death of Paradasia Pillai. This claim has not been heard and determined; the provisions of s. 2, Act VIII of 1859, do not, therefore, apply to it. Nor is there anything in that Act which required a plaintiff at once to assert all his titles to property or to be thereafter estopped from advancing them. The only ground on which objection could be taken to a second claim under the circumstances is the rule of law *Nemo debet bis vexari pro eadem Causa*, but that rule cannot apply where the right on which the suit is brought is not the same as that asserted in the former suit. *Munshee Buzloor Raheem* v. *Shumsoonijee Begum* (1) and *Rao Kurun Sing* v. *Nawab Mahomed Fyz Ali Khan* (2).

Again, in *Kunnerav* v. *Gurrav* (3) in a previous suit between the parties plaintiff had alleged that there had been a partition of the family property into two parcels, and under a deed of [47] partition drawn up at the time claimed one of those parcels; 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 alleged deed of partition. The Subordinate Judge found that the said *farkat* 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 on proper and equitable grounds for a general partition of the moveable and immoveable common family property."

MELVILL, J. in delivering the judgment of the Court said (at pp. 593, 594):—

"Several cases have been cited to us (and especially the Calcutta Full Bench case, *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (4), 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 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 judicta*, 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 [48] was constructively in issue in the former suit by reason of the provisions of Expl. II to 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,

(1) 11 M. I. A. 551.
(2) 14 M. I. A. 187.
(3) 5 B. 589 (593).
(4) 2 C. 152.

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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 antagonisitic 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). "It is then clear that this Court as well as the High Court at Madras is inclined to agree with Garth, C. J., rather than with the other Judges in *Denobundhoo's Case* (1).

The same opinion was strongly expressed in the Allahabad High Court by Stuart, C. J., in *Babu Lal* v. *Ishri Prasad* (2). And it was held by McDonell and Broughton, JJ., in *Radhanath Kundu* v. *Land Mortgage Bank of India*(3) that where a plaintiff had two separate claims against the same defendant regarding the same property he was not bound to include both in one suit by 'even the very strict interpretation put upon the decisions of the Judicial Committee by the Full Bench of this Court in the case of *Denobundhoo Chowdhry* (1).'

The case of *Babu Lal* v. *Ishri Prasad* (2) just quoted may be referred to again as illustrating the position of the present plaintiffs, whose father Pujaji was told by the Subordinate Judge in the suit of 1883, that if he was entitled to any relief, it must be sought on a cause of action arising out of the compromise.

In the Allahabad case the plaintiff, in the words of Stuart, C. J., (at pp. 586, 587, 588) "brought his position and contention fully [49] before the Court, and yet the Subordinate Judge refused to adjudicate upon the prior lien, and referred the plaintiff to another suit for that purpose. The words of the judgment are these: 'The Maharajah may sue in a proper Court to establish his lien, and then claim the benefit as against a subsequent hypothecation. When he does so, the plaintiff, or the purchaser under his decree, will have the option of paying off the first incumbrance.' And this advice the plaintiff followed, and because he did so and acquiesced in and obeyed the judgment, we are told that he is barred by the plea of *res judicata*. Now, even assuming that the Subordnate Judge was wrong, and had failed to satisfy the legal requirements of the case by his order, still the plaintiff was guilty of no neglect of his duty as a litigant in such a case, nor of any thing that could reasonably be called *laches* on his part. He simply did as he was told by the judicial authority to which he owed obedience in his suit, and I trust he is not in consequence ousted of his rights by the plea in question, for a more unjust—I had almost said a more mischievous—use of this plea I cannot conceive.

"Nor do I consider the plaintiff was bound to apply for a review of judgment, for the presumption, on which he was entitled to act, was in favour of the Subordinate Judge's judgment; and the plaintiff ought not to be prejudiced because he did as he was directed by it, instead of applying for a review of judgment which would have been a proceeding under an opposite presumption altogether—*viz.*, a presumption that made him bound

(1) 2 C. 152. (2) 2 A 582 (586). (3) 6 C. 559 (563).

to assume that the judgment was wrong. I do not consider that he was bound so to assume, but was entitled to adopt the course recommended to him by the Court. . . . . I may add that the provisions relating to the plea of *res judicata* in the new Procedure Code (Act X of 1877), and which carry the principle of the plea further than I approve in this country, do not appear to cover such a case as the present, where the Subordinate Judge does not decide on the plea one way or another, but by express order leaves it for determination in another suit; the plaintiff simply obeying the order, and the defendant recording no plea to the contrary or objection thereto."

[50] In the present case it may perhaps be urged that Pujaji was guilty of neglect in not reciting the agreement of 1874 in his plaint of 1883, and that permission to file a fresh suit on the agreement was not expressly given; and on this point reference may be made to the judgment of Stuart, C.J., in *Sarsuti* v. *Kunj Behari*(1). In the case just named, the plaintiff in the former suit had limited his claim to a mere declaration of right, but finding his mistake applied to amend his plaint so as to make it include a claim for possession. This application was refused. Stuart, C. J., held that the plaintiff, by not applying to the High Court under s. 622, against the order refusing the amendment, must be taken to have acquiesced in the refusal of his application, and though he was not prepared to lay down absolutely that a subsequent suit for possession would not, under any circumstances, lie, he very much doubted whether on sound principles of procedure it ought to be allowed. He drew a distinction between cases in which the subsequent suit may be said to be brought by leave of the Court, and cases in which parties have acted on their own responsibilty, In the former it would be idle to expect that a Court which had judicially advised the second suit would punish a plaintiff with dismissal of his suit for simply acting on the Court's advice. In the latter the plaintiff would have no right to complain if told that his second suit was liable to dismissal. The other Judges held that the second suit would lie, following the decision in *Darbo* v. *Kesho Rai*(2), in which the plaintiff being able to sue for the possession of certain property omitted to do so, and sued in the first instance only for a declaration of right to such property. This suit was rejected on the ground that the plaintiff should have sued for possession. In appeal, plaintiff was referred to a suit for possession, and it was held that the suit for possession was not barred.

As illustrations of cases in which the first suit for declaratory decree was dismissed on the ground that the plaintiff not being in possession was not entitled to a declaratory decree, as he should have instituted a suit for possession, the case of *Jibunti* [51] *Nath Khon* v. *Shib Nath Chuckerbutty* (3) and the cases there noted may be quoted. It was clearly held that a refusal to allow the plaintiff to sue in the form in which his plaint was then couched was not such an adjudication as would, under s. 13, preclude a subsequent suit, nor could it have the effect, under s. 43, of barring a subsequent suit for possession. So in the present case it may be said that the refusal of the Subordinate Judge in the suit of 1883 to adjudicate on the the right to partition, as the claim was then framed, is no bar to the present claim, the adjudication on which was expressly reserved for further suit,

(1) 5 A. 345. (2) 2 A. 356. (3) 8 C. 819.

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if such should be brought. Whether the Subordinate Judge was right or wrong, it is clear that the question as to whether Pujaji had any title on the agreement was purposely not heard and determined. This was also the case in *Ramcharan Buhardar* v. *Reazuddin* (1). Garth, C. J., said: "The effect of the former litigation, therefore, was this. It established the fact, as against some of the defendants in that suit, that the plaintiff had purchased the rights of his judgment-debtors in the entire taluq, and not only in an eight-anna share thereof; and so far that decision is *res judicata*. But on the further and more important point, *viz*,, as to *what lands* plaintiff was entitled to possession of by virtue of his purchase, the Courts found themselves unable to come to a decision by reason of errors of form in the frame of the suit. They, therefore, refrained from deciding that point, and left it to the plaintiff to bring a fresh suit, framed in such a manner that the Court might be able to grant the relief sought. It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues upon the best evidence that the parties could adduce. But we are not prepared to say that the course taken by those Courts was *ultra vires*. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause; and it is clear that a question, which was advisedly left undecided in the former suit, cannot be said to have been *heard* and *finally decided* within the meaning of s. 13 of the Code."

[52] The case of *Nilo Ramchandra* v. *Govind Ballal* (2), like *Konerrav* v. *Gurrav* (3) above quoted, is the converse of the present case. The former suit was brought on an alleged agreement. That claim was disallowed, plaintiff being referred to a separate suit for partition. The subsequent suit for partition was held not barred. So, too, in *Girdhar Manorddas* v. *Dayabhai Kalabhai* (4), the language of part of the judgment of West, J., is strikingly applicable to the persent case. He said (at pp. 181, 182): The specific legal right on which they (plaintiffs) rely is obviously quite distinct from the authority relied on before. It has arisen, if it exists, from different circumstances, and would have to be proved by different evidence. Having all the facts within their knowledge the plaintiffs, it might be said, ought, in the former suit, to have urged all their grounds of attack together, but they succeeded, in the first intance, on the ground chosen by them; and the District Judge, reversing the Judgment on that ground, would not entertain their claims on any other. If the several grounds were so connected as properly to admit of investigation and adjudication together, the District Judge ought to have dealt with them together, and determined whether on any view of the case before him the plaintiffs were entitled to a decree. If they were not so connected, it cannot be said that the former adjudication constitues a *res judicata* for that purposes of the persent case."

In the case now before us if the cause of action in both suits (that of 1883 and the present one) is the same, *viz*., the refusal of defendants to give plaintiffs their share of the ancestral estate, whether based on general right or on the agreement of 1874, then the Subordinate Judge ought to have dealt with both grounds together and determined whether on any view of the case before him the plaintiffs were entitled to a decree. If the above

(1) 10 C. 856 (859, 860).
(2) 10 B. 24.
(3) 5 B. 589.
(4) 8 B. 174.

two grounds were not so connected as properly to admit of investigation and adjudication together, then it cannot be said that the former adjudication constitutes a *res judicata* for the purposes of the present case.

[53] Another case similar to the present one in some respects is to be found in *Janaki Ammal* v. *Kamalathammai* (1). There the plaintiff in the former suit sued by general right of inheritance. Having failed in that suit she brought a second suit on the basis of a family agreement, which she had *designedly* kept back and suppressed when she was litigating the former suit through three Courts. It was held that there had been waiver of that contract, and that it would be wholly inequitable to permit her now to insist upon it.

Here all that can be said against the plaintiffs is that Pujaji did not set forth the agreement of 1874 in his plaint of 1883 or apply to amend his plaint till six days after the settlement of the issues in that suit. It cannot be said that he by deliberate suppression of the agreement prevented adjudication thereon. To bar him it must be shown that he did not at all in the former proceeding (not merely in the plaint) assert the right on which his present suit is based (*Cf. Narain Dat* v. *Bhairo Bukhshpal* (2). It is true that Pujaji might have framed that plaint of 1883 to the effect that even if his general right to partition as a member of an undivided Hindu family was lost owing to the withdrawal of the suit of 1874, he still was entitled to partition by the agreement of the parties subsequent to the filing of the former suit in 1874. He *might* have done so; but it does not follow that he *ought*. (See the judgment of Duthoit and Brodhurst, JJ., *Sheo Ratan Singh* v. *Sheo Sahai Misr* (3) and the quotation from the judgment in *Konerrav* v. *Gvrrav* (4) already given). But even assuming that he *ought* to have done so, the remarks of Westropp, C. J., in *Modhe* v. *Dongre* (5) with regard to "the many infirmities in pleading which present themselves especially in the Mofussil Courts" are most appropriate. "It is" (the passage runs) "a matter of familiar experience to us that when a party has launched his case in an inappropriate or erroneous manner, he would, if not permitted to amend after the first hearing, and if compelled to bring a fresh suit, find such new suit barred by the law of limitation. To prevent such a hardship the [54] Privy Council has, when a cause was in its most advanced stage, permitted an amendment of the plaint—*Mahomed Zahoor Ali Khan* v. *Mussamat Thakoranee Rutakoer* (6). It is also unjust to a plaintiff to put him to the great expense of fresh Court-fees for a new suit when a reasonable amendment, not inconsistent with his case as it originally stood, might equally well answer his purpose as the new suit."

Here if the Subordinate Judge in the suit of 1883 was right in holding that the agreement was inconsistent with a general right to partition, then admittedly the right procedure was reference to a separate suit. If the Subordinate Judge was wrong—if in short the agreement merely admitted the general right to partition postponing the exercise of the right till the payment of the debts—then it would indeed be a mockery should plaintiff be told that his right is altogether lost because he took the suggestion of the Subordinate Judge, and bearing the burden of all the Court-fees and costs in the former abortive suit of 1883, filed a fresh suit on the agreement. Any one with experience of the Mofussil

(1) 7 M. H. C. R. 263. (2) 3 A. 189 (190.) (3) 6. A. 358 (362).
(4) 5. B. 589 (593, 594). (5) 5 B. 609 (613, 614). (6) 11 M.I.A. 468 (486).

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must concur with the remark of Garth, C. J., in *Denobundhoo's Case* (1). "It seems to me that in a country like this, where, as in the Mofussil, good advice may not be always available, a person may not claim a property in a proper manner.") The same opinion is expressed at length by Stuart, C. J., in *Babu Lal* v. *Ishri Prasad* (2) (quoted above). He concludes: "To refuse relief to a plaintiff who makes an apparently just claim simply because his ignorant district pleader had omitted a particular plea in a previous suit, is surely a proceeding of doubtful wisdom." The many infirmities in pleading in the Bombay Mofussil Courts have been alluded to above. To hold, therefore, that plaintiffs cannot now rely on the agreement of 1874 would amount to a denial of justice. Of course if law and authority oblige us so to decide, we are bound by law and authority whatever may be the consequences. But it has been shown that in *Denobundhoo's Case* (1), which is regarded as the chief authority, the plaintiff had in the former suit deliberately refused to raise the issue which [55] was the ground of the second suit. So, too, in *Umatara Debi's Case* (3), (which was the chief authority relied on in *Denobundhoo's Case* (1), the plaintiff deliberately refused in the former suit to put forward the title on which she based her claim in the second suit. By so doing she prevented the Court from dealing with the second title. Refusal to bring forward a title is very different from omission to recite in the plaint, an omission which may be easily explained as in this case. So, too, in *Udaiya Tevar* v. *Katama Nachiyar* (4), (which was quoted as an authority in *Umatara's Case* (3), the very basis of the decision was that the ground of legal right upon which the plaintiff sued was a point raised and opened for decision in the former suits, and that it was finaly dealt with by the judgment and decree. So, too, with regard to the case of *Chinniya Mudali* v. *Venkata Chella Pillai* (5) which is quoted as an authority in the rulings on the question under consideration, it has been pointed out— *Doorga Persad Singh* v. *Doorga Konwari* (6)—that the ground of Chief Justice Scotland's decision was that the Court had refused in the first suit to allow the party who wished to impeach the judgment to go into the case which he wished to set up in the second case.

Admitting, then, that s. 43 is mainly designed to discourage multiplicity of suits—*Umed Dholchand* v. *Pir Saheb Jiva Miya* (7)—and that it is clearly the intention of the Legislature that plaintiffs should bring their entire claim and every remedy enforceable in respect of that claim into Court at once—*Kunnock Chunder Mookerji* v. *Guru Dass Biswas* (8)—and assuming that the cause of action in the present suit, even so far as it is based on the agreement of 1874, is the same as the cause of action in the suit based on a general right for partition, no law or authority hitherto accepted in this Court can be found for holding that, because Pujaji did not recite the agreement in his plaint of 1883, though it was brought forward in the proceedings and the Subordinate Judge expressly excluded it from adjudication, [56] Pujaji's sons are now barred from suing on that agreement. To use the language of the judgment of this Court in *Kakaji Ranoji* v. *Bapuji Madhavrav* (9), "it would certainly be strange, and but little creditable to our system of procedure, if we were obliged to hold that the present action is barred by the former suit in which nothing was

(1) 2 C. 152 (155). (2) 2 A. 582 (586). (3) 2 B. L. R. A. C. 102.
(4) 2 M. H. C. R. 131. (5) 3 M. H. C. R. 320. (6) 4 C. 190 (197).
(7) 7 B. 134 (136). (8) 9 C. 919.
(9) 8 B. H. C. R. A. C. J. 205 (208).

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decided except that the present action was the remedy to which the plaintiff should resort." It is true that the question referred to the Full Bench in *Denobundhoo's Case* (1), and answered in the affirmative by the majority of the Judges, was framed in such a way as to lay down the proposition that a title to property not set up in a former *plaint* cannot under any circumstances be relied on in a subsequnt suit to recover the same property. But the grounds of the decision, and the authorities quoted in support thereof, did not cover such a wide proposition, nor has such a strict interpretation of the law been approved of by the High Courts in this country.

Confining ourselves, then, to the 5th and 6th issues framed by the Subordinate Judge, which relate to the agreement of 1874, it is seen that the Subordinate Judge held that the arbitration award (*i.e.*, the agreement of 1874) was proved and valid, and that under it plaintiffs were entitled to their half share in the ancestral estate according to their position in the family. Evidently that was the intention of the agreement, should the agreement itself be binding on defendants 1—3, who were the only defendants who pleaded to the present claim.

The learned counsel for appellants did not attempt to argue that defendants 1—3 were not bound by the agreement of 1874, but contented himself with arguing generally that the present suit was barred by the previous suit. This contention has been shown to be not good; therefore the decree of the Subordinate Judge must be confirmed with costs.

Decree confirmed.

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14 B. 57=Chitty's S.C.C.R. 235.

[57] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY (*Plaintiffs*) *v.* HANMANDAS RAMKISON AND VIRJI HANSRAJ (*Defendants*).*

[27th September, 1889.]

Stoppage in transitu—Railway receipts—Effect of endorsing railway receipts—Title of indorsee of such receipts—Contract Act (IX of 1872), s. 103.

The firm of China Devakaran carried on business in Bombay. A, the agent of the firm, bought from the first defendant, Hanmandas, at Bijapur, a quantity of wheat which at A's request was on the 28th and 29th May 1889, consigned by Hanmandas to the firm of China Devakaran at Bombay, on the understanding that the consignees were not to have the wheat until they had paid the *hundis* drawn in respect of it. The wheat was sent to Bombay on the 28th and 29th May, 1889, in three consignments, *viz.*, of 56, 104 and 181 bags respectively, and two *hundis* for Rs. 1,000 and Rs. 1,500 respectively payable at sight were drawn by A in Bijapur on the firm of China Devakaran in Bombay, and were given by him to the first defendant, Hanmandas, who thereupon handed to A the three railways receipts for the three consignments which had been despatched by the first defendant's agent at Bijapur railway station. The *hundis* were sent by the first defendant Hanmandas to his agent in Bombay for collection. The *hundi* for Rs. 1,000 arrived in Bombay on the 31st May, and was paid on the 1st June.

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* Small Cause Court Suit No. $\frac{186}{14315}$ of 1889.

(1) 2 C. 152.