APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

BAI NATHI WIFE OF KARSAN HANSJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* NARSI DULLABH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1919. *August* 2

Civil Procedure Code (Act V of 1908), section 11—Res judicata—Issue in a former suit heard and decided—Issue not necessary for the decision—Second suit not barred by res judicata.

The plaintiff as the daughter of one B sued to recover possession of properties, alleging that they formed part of a *bhag* in the village of Rahad, of which B had become the owner. In a former suit between the parties the defendant claimed the property as the nearest male agnate and heir of B. An issue was raised whether the custom of the daughter's exclusion by a *pitrai* heir was proved to have been in existence in the *bhagdari* village of Rahad and it was heard and decided but the suit was dismissed on the ground that the defendant, who was the plaintiff in that suit, was not proved to be the nearest *pitrai* heir to B. It was contended that by reason of this finding the plaintiff's suit was barred by *res judicata*, within the meaning of section 11 of the Civil Procedure Code, 1908.

Held, that the suit was not barred by *res judicata* because, although the issue was heard and decided, it was not finally decided as it was not necessary for the decision which the Court came to dismissing the suit and the plaintiff had no necessity of appealing against the Court's finding on that issue.

FIRST appeal against the decision of K. H. Kirkire, First Class Subordinate Judge of Broach, in Suit No. 224 of 1914.

Suit to recover possession.

The properties in suit formed part of a *bhag* in Rahad in Waghra Taluka. That *bhag* originally stood in the name of one Desai Purshottam in the Revenue Record. Desai Purshottam and Bapu Odhav were first cousins and were joint in estate. On Desai's death Bapu

* First Appeal No. 257 of 1916.

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became the sole owner of the *bhag*. Bapu died leaving his widow Bai Ratan and a daughter Nathi (plaintiff No. 1). Bai Ratan became the sole owner of the *bhag*. She gave it for management and maintenance to her sister-in-law Bai Lala whose son Gadbad (defendant No. 3) got the *bhag* transferred to his name on his attaining majority.

In 1902 Bai Ratan died.

In 1912 two persons, Narsi Dullabh and Tribhowan Desai (defendants Nos. 1 and 6 in this suit), filed a suit No. 128 of 1912 against the present plaintiff No. 1 claiming to recover a portion of Bapu Odhav's share, alleging that they had purchased that share from one Desai Manor who was the nearest male agnate and heir of Bapu and that under the custom prevalent in the village of Rahad, a daughter was excluded by a *pitrai* heir. An issue No. 1 raised in that suit was, "Is Desai Manor proved to be the nearest heir of the deceased Bapu Odhav to the exclusion of his daughter under the Bhagdari Act or any custom prevailing among the parties" and the Court's finding on the issue was "Though a custom of the daughter's exclusion from such inheritance must be held as existing in this *bhagdari* village, Desai Manor is not proved to be nearest *pitrai* heir to Bapu Odhav, deceased." The suit was, therefore, dismissed on the ground that Desai Manor was not proved to be the *pitrai* heir of deceased Bapu.

In 1914 Bai Nathi (plaintiff No. 1) and plaintiff No. 2, who was a purchaser from her, sued to recover from the defendants the possession of the properties in Schedules C, E, F, which formed portions of Bapu Odhav's *bhag*, alleging that the custom of excluding daughters from inheritance did not obtain in Rahad

and that the question of Desai Manor's agnatic relationship with deceased Bapu was *res judicata* by reason of the decision in Suit No. 128 of 1912.

Defendants contended that under *bhagdari* custom daughters were excluded; that this question was concluded by reason of Court's finding on the issue in Suit No. 128 of 1912 and that the claim was barred by limitation.

Before the Subordinate Judge an issue was raised, "How far the finding of custom (daughters are excluded by *pitrais*) is binding on the plaintiffs" and the decision was "The finding on issue No. 1 in the old Suit No. 128 of 1912 is binding on the present plaintiffs Nos. 1 and 2 and operates as *res judicata* against them." He, therefore, dismissed the suit as barred by *res judicata*.

Sir Chimanlal Setalvad with *N. K. Mehta*, for the appellants.

Jayakar with *G. N. Thakor*, for respondents Nos. 1 and 2.

B. D. Mehta, for respondent No. 5.

The following authorities were cited in arguments: *Thakur Magundeo* v. *Thakur Mahadeo Singh*[1]; *Ghela Ichharam* v. *Sankalchand Jetha*[2]; *Parbati Debi* v. *Mathura Nath Banerjee*[3]; *Daudbhai Allibhai* v. *Daya Rama*[4]; and *Niamut Khan* v. *Phadu Buldia*[5].

MACLEOD, C. J.:—The plaintiffs sued to recover possession of the properties described in Schedules C, E, F attached to the plaint, and mesne profits, alleging that the plaint properties formed part of a *bhag* in Rahad in Waghra Taluka. The 1st plaintiff claims

(1) (1891) 18 Cal. 647.
(2) (1893) 18 Bom. 597.
(3) (1912) 40 Cal. 29.
(4) (1918) 43 Bom. 568.
(5) (1880) 6 Cal. 319.

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as the daughter of Bapu who is alleged to have become the owner of the *bhag* as a survivor between himself and Desai Purshottam, his first cousin. The 2nd defendant was the son of Bai Lalu, the sister-in-law of the plaintiff's mother. The 1st defendant claims title to the plaint property through Desai Manor, a distant relation of Bapu, and also in virtue of a transfer from Gadbad, the 2nd defendant. The defendants Nos. 3 to 5 claim to be in possession through Bapu's cousin Desai Purshottam, and the 6th defendant claims through Desai Manor.

The suit was dismissed by the learned Subordinate Judge on the ground that it had been decided in a former suit, in which the 1st plaintiff and defendants Nos. 1, 3, 4 and 5 were parties, that females were excluded from inheritance to this particular *bhag*. That suit was brought by the transferees of Desai Manor against the present plaintiffs and others alleging that Desai Manor was the nearest male agnate and heir of Desai Purshottam and Bapu. The suit was dismissed on the ground that, whether females were excluded from the inheritance or not, Desai Manor was not proved to be the nearest *pitrai* heir to Bapu. An issue was raised whether the custom of the daughter's exclusion by a *pitrai* was proved to have been in existence in the *bhagdari* village of Rahad. The Court held that it was proved in the case that in the *bhagdari* village of Rahad the daughter was excluded from inheritance to her father's property. It must be noted that the suit was dismissed because plaintiffs claimed through Desai Manor who was not proved to be the nearest *pitrai* heir to Bapu, and, therefore, there was no necessity for a finding on the issue whether the daughter was excluded by a *pitrai* in this particular *bhagdari* village. It has been argued in support of the judgment of the Court below that this finding is *res judicata* within the

meaning of section 11 of the Code of Civil Procedure. No doubt the issue was heard and the issue was decided, but it was not finally decided, because it was not necessary for the decision which the Court came to dismissing the suit, and Bai Nathi had no opportunity of appealing against the Court's finding on that issue. In fact there was no necessity for her to appeal, even if she could have appealed against it, because she got everything which she wanted in the suit which was filed against her. We have been referred to the case of *Niamut Khan* v. *Phadu Buldia*[1]. But that case was referred to in *Thakur Magundeo* v. *Thakur Mahadeo Singh*[2]. The Judges there say that the Privy Council in a more recent case have expressed an opinion which is in opposition to the judgment of the Full Bench in *Niamut Khan* v. *Phadu Buldia*[1]. The test they applied is this: has the issue been finally decided, and they say "We think that the finding of the Court in the previous suit was not final, inasmuch as the decree was not based upon it, and there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded," and that case was followed in *Parbati Debi* v. *Mathura Nath Banerjee*[3]. In my opinion that is a correct test to apply to the question before us. If when drawing up the decree it had been declared that females were excluded from inheritance in this *bhagdari* village, then it might have been urged that the matter had been finally decided, on the ground that Bai Nathi might have appealed against that decision, and had not done so. But ordinarily where a suit is dismissed nothing is stated in the decree except "the suit is dismissed." Against that decree the defendant cannot appeal. In my opinion, therefore, the finding of the lower Court

(1) (1880) 6 Cal. 319. (2) (1891) 18 Cal. 647 at p. 651.
(3) (1912) 40 Cal. 29.

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that this question was *res judicata* against Bai Nathi was wrong, and therefore the suit ought not to have been dismissed on that ground.

But it has been suggested that the suit is also liable to be dismissed as bad for misjoinder of parties and causes of action. That should never be a ground by itself for dismissing a suit. The party against whom misjoinder is alleged, must always have an opportunity of remedying the defect, by striking out the parties who ought not to have been joined and amending the plaint, and also by making any necessary amendments so as to strike out any causes of action which ought not to have been joined. This is only a technical ground, which should never form the foundation for an order dismissing a suit, as the matter can always be put straight by directing the party who has made the original mistake to pay the costs of the opposite party incurred on account of a mistake having been made. Therefore the order dismissing the suit must be set aside and the appeal allowed with costs. The case will then go back to the lower Court to be tried on the merits under Order XLI, Rule 23, and the plaintiff must have an opportunity, if the Judge so directs, to amend her plaint.

HEATON, J.:—I agree, and as to the point of *res judicata* I agree for the reasons given by me in my judgment in the case of *Daudbhai Allibhai* v. *Daya Rama*[5].

Decree reversed.

J. G. R.

[5] (1918) 43 Bom. 568.