

(1910) 01 AHC CK 0003
In the Allahabad High Court

Syed Farhat Husain and Others

APPELLANT

Vs

Mahomed Ibrahim Ali and Others

RESPONDENT

Date of Decision : 12-01-1910

Acts Referred:

Citation : 5 Ind. Cas. 325

Hon'ble Judges : Karamat Husain, J

Bench : Single Bench

Judgement

Karamat Husain, J.—In this appeal two points are argued; the first is that the suit is barred by the doctrine of res judicata and the second is that the suit is barred by limitation. Both the above pleas are based on the previous litigation relating to the property in dispute. That litigation briefly stated is as follows: In 1887, Gohar Ali, Anwar Ali and their mother, Husaini Begam, permitted one Nanda to build a house in the serai now in dispute. Enayat Ahmed and Ahmed Ali, sons of Saadat Ali, brought an action against Gohar Ali, Anwar Ali, Husaini Begam, Nanda and Kareem-un-nissa. The parties are unable to state who Kareem-un-nissa was. The suit was instituted on the allegation that the plaintiffs along with Gohar Ali, Anwar Ali, Husaini Begam and Kareem-un-nissa were the joint proprietors of the serai and that no co-sharer could, without the consent of the rest, permit any one to build a house in the serai. The relief which was claimed was that by declaring the ownership and joint possession of the plaintiffs, the defendants might be restrained from exercising an exclusive right of ownership, and that Nanda might be dispossessed of the land on which he had built. The defence of Anwar Ali, Gohar Ali and Husaini Begam was that they were the proprietors and had been in adverse possession for more than the statutory period of limitation. In that suit Abbas Ali, a vendee claiming through the heirs of Khairat Ali, applied to be made a party but his application was rejected on the ground that the parties to the suit did not admit his title. The suit of Enayat Ahmed and Ahmed Ali, which was Suit No. 49 of 1887, was decreed on the 10th June 1857. There was an appeal to the District Judge of Aligarh, which was dismissed on 29th June 1888. Abbas Ali then brought a suit against Gohar Ali,

Husaini Begam, Anwar Ali and Nanda; first set, and Ahmed Ali, Enayat Ahmed, Ashwaq Ahmed, second set In that suit he claimed to be the owner of half of the serai under the sale-deed of 21st November 1862, executed by the representatives of Khairat Ali in his favour. The relief sought was that by a declaration of his right to half the property, joint possession over the serai might be awarded, that Nanda might be dispossessed and the property restored to its original condition. It is to be noticed that no relief was sought against Ahmed, Ali, Enayat Ahmed and Ashwaq. Ahmed defendants second set. The defendants second set, in their written statement, traversed the allegation as to ownership and joint possession of the plaintiff. The Munsif in his judgment of the 19th December 1887 said: "The plaintiff has failed, in my opinion, to prove that since the date of his purchase he ever held possession of the land in dispute or that he ever got a share in the rent proceeds of the same. I find that the claim of the plaintiff is barred by limitation." He, therefore, dismissed the plaintiff's suit. Abbas Ali appealed to the lower appellate Court. During the pendency of the appeal, Enayat Ahmed died and his representatives were not brought on the record. The lower appellate Court, towards the end of its judgment, dated the 2nd September 1890, remarked; "I find for the plaintiff and thus decide the second issue also. The appeal and the claim are decreed with costs against all the defendants, except Enayat Ahmed's heirs. Against the latter it is dismissed with costs." The reason for dismissing the appeal against the heirs of Enayat Ahmed appears from the following remarks in the judgment of the appellate Court: "At the hearing of the appeal, it transpired that Abbas Ali appellant and Enayat Ahmed, one of the respondents, are both dead. Abbas Ali died on 18th October 1889 and Enayat Ahmed died on 7th February 1888. The application for the substitution of the names of Enayat Ahmed's heirs was presented on 12th September 1888, i.e., more than six months after the date of the death of Enayat Ahmed. Therefore, so far as his (Enayat Ahmed's) heirs are concerned, the appeal abates. Against the rest of the respondents it is heard." The above is a short account of the" previous litigation relating to the property in suit. The facts of the present litigation are shortly these: In the year 1905, the heirs of Abbas Ali instituted a suit for partition and for possession of their share. The suit was based on the sale-deed of 21st November 1862, made by the representatives of Khairat Ali in favour of the predecessor-in-title of the plaintiffs. The defence by Farhat Hossain was that the suit was barred by res judicata and by limitation. The Court of first instance came to the conclusion that the suit was neither barred by the doctrine of res judicata nor by limitation, and it gave the plaintiffs a decree which was confirmed by the lower appellate Court on appeal. Farhat Hossein, son of Ahmed Ali, Murammah Mahmood-un-nissa, daughter of Ahmed, Ali, Mushtaq Ahmed, son of Enayat Ahmed, Bibi Jagan, daughter of Enayat Ahmad and Mahomed Fida Ali, son of Walli Ullah, came to this Court in second appeal. The first point raised on their behalf is that with reference to the previous litigation the plaintiffs' suit is barred by the doctrine of res judicata. The learned Vakil who appeared for the appellant argues that in the suit, which was instituted by Abbas Ali in 1887, he claimed dispossession of Nanda from the site

which was given to him by Gohar Ali, Ahmed Ali, and Hossemi Begam. He based his title on a sale-deed executed in his favour by the representatives of Khairat Ali; that Enayat Ahmed and Ahmed Ali resisted the suit on the ground that the plaintiff had no right to the property, that he had not been in possession within 12 years of the institution of the suit and that the Munsif dismissed his suit on the ground of limitation. Under these circumstances, the learned Vakil for the appellant argues that the heirs of Abbas Ali are not entitled to re-open the question of title and possession against the appellants in this second appeal. The learned Counsel for the respondents meets this argument in the following manner. He says that from the dismissal of the suit of Abbas Ali by the Munsif there was an appeal and that appeal was decreed but so far as the heirs of Enayat Ahmed were concerned it abated, because his representatives were not brought upon the record within the period prescribed by limitation. That being the case, it is not right to say that the suit by the heirs of Abbas Ali so far as the heirs of Enayat Ahmed were concerned was "heard and finally decided." For the application of the doctrine of res judicata, it is necessary that the matter must have been heard and finally decided. In support of this proposition, the remarks of their Lordships of the Privy Council in Radha Prashad Singh v. Lal Saheb Rai are relied on. Those remarks are as follows: "None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or decided by the Judge of the Shahabad Court in 1881 and his decree dismissing the suit does not constitute res judicata within the meaning of the Civil Procedure Code." He also relies on Bitto Kunwar v. Kesho Prasad Misr in which their Lordships of the Privy Council rule that it was not within Section 13 of the Code, the matter not being tried and determined in the suit. The learned Counsel further says that as the appeal against the heirs of Enayat Ahmed abated and as the case was not governed by the doctrine of res judicata, the only other section which could bar the suit was Section 371 of the old Code, but that the essential element under that section which bars a fresh suit is that the cause of action for the second suit is the same as that of the former suit, but such is not the case here. The cause of action for the former suit was, according to the learned Counsel for the respondent, the infringement upon his clients' right by giving permission to Nanda to build, while the cause of action for the present suit is the withholding of the partition of the property to which the heirs of Abbas Ali are entitled. The term "cause of action" has been differently construed. In Murti v. Bhola Ram the majority of the Judges of this Court, on the basis of English authorities, laid down that the cause of action consists of every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. In that sense the cause of action comprises his title when in issue and the acts of the defendants which infringe upon that right. The expression "cause of action" has a limited sense also and includes the facts constituting the infringement of the right but not those constituting the right itself. See Haramoni Dasi v. Hari Churn 22 C. 883 at p. 839. The expression being capable of two different meanings, it is to be determined which of these two meanings is to be attached to it in Section 371. Having regard to the ruling of their Lordships

of the Privy Council that for the purpose of the application of the doctrine of res judicata it is necessary that the issue must have been heard and finally decided, I am of opinion that the expression "cause of action" in Section 371 is to be taken in its limited sense, that is, the facts constituting the infringement of the right and not those constituting the right itself. If the expression were taken in its broad sense, the question of title, which was not heard and finally decided, could not be re-opened. That being my view, I am of opinion that the previous decisions arrived at by the Munsif and the Court of first appeal do not operate as res judicata, even in favour of the heirs of Enayat Ahmed and that the present suit is not barred by Section 371 against them inasmuch as the "cause of action" in its limited sense is not identical in the two cases. This disposes of the first point.

2. The second point urged by the learned Vakil for the appellant is that so far back as the year 1887, the appellants, that is, the representatives of Ahmed Ali and Enayat Ahmed, in very distinct and clear terms denied the possession of Abbas Ali and that, therefore, the representatives of the latter without establishing that they have been in possession of the property in dispute within 12 years of the institution of the present suit are out of Court on the ground of limitation. The lower appellate Court in its judgment in Appeal No 69 of 1907, remarks as follows: "It is true that the witnesses for the defendants said that Gohar Ali and his father and not any other co-sharer collected rent (takina) from them. If it is so, Farhat Ali (Husain) and other co-sharers and plaintiffs occupy the same position. This shows that Gohar Ali actually collected rents from tenants in the serai and that Farhat Ali (Husain) and other co-sharers, i.e., the plaintiffs and the appellants before me, were not in actual possession. If they are in possession, they are in possession through Gohar Ali. The decree which the plaintiff for joint possession have got is final against Gohar Ali who actually collects rents, and the appellants here are not in actual possession and occupy the same position as the plaintiffs." Under these circumstances they not being in actual possession cannot say that the suit of the plaintiffs for possession is barred. Gohar Ali, who was in actual possession by collecting rent, could have put forward that plea but the plaintiffs have a decree against him and the appellants have no right to put forward that defence. For the above reasons the appeal fails and is dismissed with costs, including in this Court fees on the higher scale.