APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1948

Mar. 5.

MA KHIN (APPELLANT)

v.

MA PU AND TWO OTHERS (RESPONDENTS).*

Order II, Rule 2, Civil Procedure Code and s. 11—Res judicata—*Conditions to be satisfied—First suit for rent—Second for title against tenant and other persons—Whether suit barred.*

Appellant-plaintiff claimed to be adoptive daughter of Daw Thon in Civil Regular No. 9 of 1944 of the Additional Court, Mandalay. Her claim as adopted daughter was upheld and she was declared one of the heirs. In Civil Regular No. 4 of 1945 of the Assistant Judge, Mandalay, she sued for rent alleging that respondents 1 and 2 were her tenants. This was dismissed. She later filed Civil Regular No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, for possession of those lands, and she impleaded the alleged tenants and two others. Respondents 1 and 2 contended that the suit was barred as *res judicata* but the suit was decreed; the District Court reversed the decision of trial Court on appeal.

On second appeal held that the only question that need have been gone into in the first suit was whether respondents 1 and 2 were tenants. The first suit was only for rent and the second for title. The parties were also different. To constitute *res judicata* five conditions must be satisfied:

(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue* either actually or constructively in the former suit.

(2) The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim.*

(3) The parties as aforesaid must have *litigated under the same title* in the former suit.

(4) The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been *heard and finally* decided by the Court in the first suit.

Mulla's Civil Procedure Code, 10th Edn., p. 40, followed.

Held: That in a suit for rent, the question of title was not directly and substantially in issue either actually or constructively. In the subsequent suit based on title the question of title could not be held to be *res judicata*. Further as the parties were different there cannot be any *res judicata*.

* Civil 2nd Appeal No. 98 of 1947 against the decree of the District Court of Mandalay in Civil Appeal No. 10 of 1947, dated the 12th May 1947.

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Dwarkanath Roy v. *Ram Chand Aich and others*, 26 Cal. 428, followed and applied.

A. C. Rodriguez for the appellant.

A. N. Basu for the respondents.

U THAUNG SEIN, J.—This is an appeal against the judgment and decree of the District Court, Mandalay, in Civil Appeal No. 10 of 1947, setting aside the decree of the 2nd Assistant Judge, Mandalay, in his Civil Regular Suit No. 27 of 1946. The facts involved in the case are as follows.

In or about the year 1944, one Daw Thon died leaving a considerable estate of landed properties among which was alleged to have been included a piece of land known as Holding Nos. 78, 81 (*a*) and 81 (*b*) in Nanda Myauk *Kwin* No. 451 and measuring 12 acres. The appellant-plaintiff who claims to be an adoptive daughter of Daw Thon then filed Civil Regular Suit No. 9 of 1944 of the then Divisional Court, Mandalay, for the administration of her adoptive mother's estate. It appears that in that suit she was able to establish her adoption by Daw Thon and was declared one of the heirs to the estate. This was followed by another suit—Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay—in which the appellant-plaintiff, both on behalf of herself and her minor son Maung Tun Maung, sued the 1st and 2nd respondents (Ma Pu and Maung Hla Maung) for the recovery of 215 baskets of paddy or their value as rent due in respect of the above-mentioned lands. It was alleged that these respondents had worked the lands as tenants of the appellant-plaintiff. The learned Assistant Judge, Mandalay, held that the appellant-plaintiff had failed to prove that the lands had been leased by her to the two respondents and accordingly dismissed the suit. The appellant-plaintiff then sued once again in Civil Regular Suit

No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, for possession of those lands. She impleaded the respondents Ma Pu, Maung Hla Maung and U Ye, and Ma Ngwe Myaing in that suit and claimed that she was the sole heir of the lands in question. It was admitted however that U Ye, Ma Ngwe Myaing and herself were the heirs of Daw Thon's estate. But the appellant-plaintiff alleged that U Ye and Ma Ngwe Myaing had signed a certain deed of release and as such she was the sole heir to those lands. She went on to say that the respondents Ma Pu and Maung Hla Maung were tenants of Daw Thon on those lands and as such she was entitled to possession. The suit was contested mainly by the 1st and 2nd respondents (Ma Pu and Maung Hla Maung) and they asserted that the appellant-plaintiff was not an heir of Daw Thon and further that the present suit was barred by the principles of *res judicata* and under the provisions of Order II, Rule 2, of the Civil Procedure Code, in view of the decision in the former suit (Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay) between the same parties. Other defences were also set up, *e.g.* that the respondents were in adverse possession, and the trial Court framed a number of issues which I do not propose to reiterate.

As regards the contention that the suit was barred by the principles of *res judicata* and under Order II, Rule 2, of the Code of Civil Procedure, the learned 2nd Assistant Judge framed the following issue: "Whether the suit is barred by Doctrine of Estoppel by section 11 and Order II, Rule 2, Civil Procedure Code, for reasons mentioned in paragraph 9 of the 1st defendant's amended written statement?" The trial Court held that the suit was not barred by *res judicata* or under the provisions of Order II, Rule 2, of the Civil Procedure Code, and proceeded to try it on

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its merits and passed a decree in appellant-plaintiff's favour. On appeal to the District Court, Mandalay, this decree was set aside by the learned District Judge on the ground that the trial Court had erred in its findings on the principles of *res judicata*.

In order to understand whether the subsequent suit (Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay) was in fact barred by *res judicata* or Order II, Rule 2, Civil Procedure Code, it is essential to study Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, in a little more detail. In the latter suit, *i.e.* Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, two plaints were filed under the following circumstances. In her first plaint the appellant-plaintiff who was suing on behalf of herself and her son claimed that she was an adoptive daughter of Daw Thon and that the suit lands had been gifted to her orally by the adoptive mother. Later she transferred these lands to her minor son Maung Tun Maung by means of a registered deed in accordance with Daw Thon's wishes before her death. The respondents Ma Pu and Maung Hla Maung were said to be tenants of Daw Thon and the appellant-plaintiff prayed for a declaration that she was an heir of the deceased Daw Thon and for recovery of a rental of 215 baskets of paddy or their value. The two respondents filed written statements denying that the appellant-plaintiff was an heir of Daw Thon, and pleaded that the real heirs were U Ye and Ma Ngwe Myaing and as such these persons should be added as parties to the suit. The learned Assistant Judge by a preliminary order dated the 12th February 1946 held that as the appellant-plaintiff was suing as an heir of Daw Thon the other heirs, namely U Ye and Ma Ngwe Myaing, should also be brought on to the record as parties. But the learned trial Judge remarked, "However if

plaintiffs (appellants) state that defendants are their tenants and not that of Daw Thon the other heirs of Daw Thon would have no say in the matter." The appellant-plaintiff acted on this remark and finally in the amended plaint she claimed that the respondents were her tenants and prayed for the payment of the rent due or its value. The whole nature of the suit was thus changed and as it was now a simple rent suit the other heirs of Daw Thon were not added as parties. However, the respondents contended that these heirs were necessary parties and U Ye also filed an application to be made a party. The trial Court then framed no less than six issues while in fact one main issue would have settled the case. The only question that need have been gone into was whether the respondents Ma Pu and Maung Hla Maung were the tenants of the appellant-plaintiff. If they were found to be the tenants of the appellant-plaintiff, then they could not have questioned the title of the appellant-plaintiff (*vide* section 116, Evidence Act). This was, no doubt, in the mind of the Assistant Judge when he remarked in his preliminary order that in the event of the appellant-plaintiff claiming to have leased out the lands, the other heirs of Daw Thon would not be necessary parties. The learned Assistant Judge then went into the question as to who was the owner of the lands and whether the appellant-plaintiff had leased them to the respondents. He held that the lands were part of the estate of Daw Thon and that appellant-plaintiff had failed to prove that she had leased them to the respondents, and accordingly dismissed the suit. In my opinion, the issue as to who was the owner of the land was quite unnecessary as the ownership was immaterial if the appellant-plaintiff was able to prove that she had leased the lands to the respondents Ma Pu and Maung Hla Maung. Another fact which should be

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noted is that U Ye and Ma Ngwe Myaing were not added as parties after the amended plaint.

Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, out of which the present appeal has risen was of an entirely different nature to that of Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay. The appellant-plaintiff, having failed to prove that she had leased the lands to the respondents, now sued to establish her title to the property as an heir of Daw Thon and for possession of the same. The learned District Judge has remarked that the land in both the suits is the same, that appellant-plaintiff had by her amendment of the plaint in the former suit (*i.e.* Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay) abandoned her claim as an alleged heir, and that the question whether the suit lands had been gifted to her son should have been the subject of an issue, and hence under explanation 4 to section 11, Civil Procedure Code, the latter suit (*i.e.* Civil Regular Suit No. 27 of 1946 of the Assistant Judge, Mandalay) was barred by the principles of *res judicata*.

I propose to take up first the question whether the subsequent suit, *i.e.* Civil Regular Suit No. 27 of 1946 of the Assistant Judge, Mandalay, was barred by the principles of *res judicata*, and then go on to consider whether the appellant-plaintiff had abandoned her claim to the lands as an heir, *vide* Order II, Rule 2, Civil Procedure Code.

The principles of *res judicata* are well known and they are enumerated under section 11, Civil Procedure Code. In order to constitute a matter *res judicata* the following conditions must be satisfied. I quote below from page 40 of Mulla's Code of Civil Procedure, 10th Edition :

"(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was

directly and substantially in issue either actually or constructively in the former suit.

(2) The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim.*

(3) The parties as aforesaid must have *litigated under the same title* in the former suit.

(4) The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the first suit.

Now, Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, was essentially a suit for rent whereas Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, was one for possession based on title. The question is whether "the matter directly and substantially in issue" in the latter suit was "directly and substantially in issue either actually or constructively" in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay. The learned District Judge has held that the question whether the appellant-plaintiff transferred the lands to her son Maung Tun Maung should have been in issue and must be deemedto have been in issue by explanation 4 to section 11, Code of Civil Procedure. I have read Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, and it was essentially a suit for rent and though the appellant-plaintiff repeated in her amended plaint that she was the adoptive daughter of Daw Thon and had received the lands in gift and had in turn transferred them to her son no issue was in fact necessary on these matters. As I have pointed out earlier the real issue between the parties was whether the relationship of landlord and tenant existed between them. Questions of title to the lands could not have been litigated, *vide* section 116 of the Evidence Act.

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The learned Assistant Judge framed an issue, "Who is the owner of the land?" and decided that they were owned by Daw Thon. The question of appellant-plaintiff's title in the lands was not gone into. If this question was not dealt with, I fail to see how "the matter directly and substantially in issue" in Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, could be said to be identically the matter which was in issue in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay.

Next, were the parties in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, the same as those in Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay? The learned District Judge, Mandalay, appears to have missed this point altogether. The parties in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, were the appellant-plaintiff Ma Khin and her son Maung Tun Maung *versus* Ma Pu and her son Maung Hla Maung (1st and 2nd respondents). An attempt was made in that suit to bring U Ye (3rd respondent) and Ma Ngwe Myaing on the record as parties, but as pointed out by the learned 2nd Assistant Judge, Mandalay, the suit being one for rent based on a tenancy, they were not necessary parties. These two individuals were not in fact parties to that suit and no written statements were filed by them. They were added as parties in Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, only. Where the parties are different there cannot be any *res judicata*. This is laid down in the ruling *Dwarkanath Roy* v. *Ram Chand Aich and others* (1). The head-note of that ruling reads as follows:

"A decision in a suit for rent brought by a plaintiff against a person who is alleged to have been his tenant in respect of

(1) 26 Cal. 428.

certain land, does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the alleged tenant but also against the person whose title as landlord the tenant-defendant has set up in the rent suit."

There is, in my opinion, a striking resemblance between the case under consideration by me and the ruling referred to above. The ruling refers to a case in which the plaintiff brought a suit for rent against a defendant who was said to be his tenant. The defendant pleaded that the plaintiff was not the landlord and referred to some other person as the owner of the lands. The plaintiff brought another suit against the alleged tenant and the person who was said to be the owner in order to establish his title to the land. It was held that the subsequent suit was not barred by *res judicata*.

Finally, the learned District Judge held that the appellant-plaintiff had by the amendment of her plaint in Civil Regular Suit No. 4 of 1945 of the Assistant Judge, Mandalay, abandoned her claim to the suit lands as an heir of Daw Thon. Learned counsel for the respondents has laid great stress on this and says that as the appellant-plaintiff withdrew part of her claim without leave of the Court to file a fresh suit, under Order XXIII, Rule 3, of the Civil Procedure Code, she is precluded from filing any fresh suit in respect of those lands. The answer to this is that the appellant-plaintiff had been declared an heir to the estate of Daw Thon in Civil Regular Suit No. 9 of 1944 of the then Divisional Court, Mandalay, and so far as the respondents U Ye and Ma Ngwe Myaing are concerned it was not open to them to re-open this question again. It was quite unnecessary for her to establish her title as an heir and she therefore apparently decided to sue for rent alone in Civil Regular Suit No. 4 of 1945

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of the Assistant Judge, Mandalay. I am in agreement with the learned Assistant Judge, Mandalay, that by altering the nature of the suit the appellant-plaintiff did not in fact abandon her title as an heir to the estate of Daw Thon. Accordingly, I am of the opinion that the learned District Judge, Mandalay, erred in holding that Civil Regular Suit No. 27 of 1946 of the 2nd Assistant Judge, Mandalay, was barred by the principles of *res judicata* and the appeal will accordingly be allowed.

I note that the learned District Judge decided the appeal on a point of law and set aside the decree of the lower Court. He has not dealt with the case on its merits. It will therefore be necessary to return the appellate proceedings to the District Judge in his Civil Appeal No. 10 of 1947 for a fresh hearing on the facts. The decree of the District Court is therefore set aside and Civil Appeal No. 10 of 1947 of the District Court, Mandalay, will be remanded to that Court to be dealt with on the merits and according to law. Costs will abide by the final decision in that appeal.