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Court : Chennai

Decided On : Apr-02-1895

Reported in : (1895)ILR18Mad466

Judge : Subramania Ayyar, J.

Appellant : Pathaperumal Chetti

Respondent : Murugandi Servaigaran and ors.

Judgement :

Subramania Ayyar, J.

1. The Subordinate Judge, being of opinion that the dismissal of the plaintiff's (petitioner's) previous Suit No. 1158 of 1892 for non-production of a certificate of heirship was a dismissal under Section 158[1] Civil Procedure Code, has held that the plaintiff's present suit on the same cause of action is barred.
2. The Subordinate Judge's decision is questioned on behalf of the plaintiff on two grounds:
3. The first is that, assuming, for argument's sake, that the dismissal was on account of the plaintiff's omission to produce a certificate, the case did not fall under Section 158, Civil Procedure Code.

4. Now the rejection of a suit to operate as a bar to the entertainment of a subsequent suit on the same cause of action must rest either on a statutory prohibition similar to that contained in Section 103, Civil Procedure Code, or on the principle of *res judicata*. But there is no specific provision in the Code laying down that a dismissal under Section 158 shall be a bar to a second suit on the same cause of action. It has, however, been held that when a Court, acting properly under Section 158, dismisses a suit, such dismissal is tantamount to *res judicata*; see *Venkatachalam v. Mahalakshamma* I.L.R. 10 Mad. 272 which was decided with reference to Section 148 of Act VIII of 1859, corresponding to Section 158 of the present Code. In that case *Muttusami Ayyae and Parker, JJ.*, observed thus: 'As to the contention that Section 148 did not expressly prohibit a second suit, it should be remembered that it directed that the Court might proceed to decide the suit notwithstanding the default constituting thereby the decision on the imperfect material on the record into a decree on the merits, which, under Section 13, would bar a second suit. No express rule of prohibition is inserted, because the decision is a decree on the merits and not a mere judgment by default.' Whether *Handley and Weir, JJ.*, in *Shaik Saheb v. Mahomed* I.L.R. 13 Mad. 510 intended to throw any doubt on *Venkatachalam v. Mahalakshamma* I.L.R. 10 Mad. 272 is not quite clear. However that may be, I must follow the construction adopted in the latter case. Now, as a decision under Section 158, though passed on imperfect materials, is yet to be treated as one on the merits, no decision can be held to have been arrived at under that Section unless the circumstances of the case were in point of law, such as to permit the Court to pronounce on the merits, had the necessary materials for doing so been before

5. But the non-production of a certificate of heirship is not a failure to adduce evidence in a case where a Court is at liberty to determine the merits, but an omission to do that without which the tribunal is precluded from entering into the merits at all. Consequently the dismissal of a suit for such a cause cannot be taken as a decree under Section 158. The present case is analogous to *Putali Meheti v. Tulja* I.L.R. 3 Bom. 223 where *West and Pinhey JJ.*, ruled that the rejection of a previous suit for the plaintiff's omission to produce a certificate of the Collector under Section 6 of the Pensions Act did not bar a second suit on the same cause of action. *West, J.*, said: 'When a suit has failed through a formal

defect, and the merits have not been so pronounced on as to constitute a legal relation resting on the act of the Court, another suit is not, by the English law, barred. This rule is consonant to justice and agrees with the law as set forth in the Code of Civil Procedure.' ,

6. It cannot be said that the analogy between a case where a plaintiff omits to produce the Collector's certificate under the Pensions Act and a case where he fails to produce a succession certificate required by Act VII of 1889 is incomplete, because in the former case the absence of the Collector's certificate prevents a Court from taking cognizance of the claim (Section 6 of Act XXIII of 1871), whereas in the latter, a Court is precluded from passing a decree except on the production of a certificate (Section 4, Act VII of 1889). For, in *Nawab Muhammad Azmat Ali Khan v. Mussumat Lalli Begum* L.R. 9 IndAp 8 it was held by the Privy Council that a suit relating to a grant of property within the meaning of the Pensions Act need not be dismissed, because no certificate had been obtained before the commencement thereof. And even this decision apart, it appears to me that the real effect of a failure to produce a certificate in either case, whether such production should take place at the institution of a suit or at some later stage, is to prevent a Court from pronouncing on the merits so as to render its decision an adjudication having the force of *res judicata*. I think, therefore, that the dismissal of the petitioner's suit of 1892, assuming that it was due to his omission to produce a succession certificate, is not a bar to the present claim.

7. This being my view it is unnecessary to consider the other contention raised by the petitioner, viz., that the Subordinate Judge was wrong in holding that time had been granted to him within the meaning of Section 158,--even if that Section were held applicable to the circumstances of the suit of 1892.

8. The decree of the Subordinate Judge is set aside and the suit should be restored to the file and dealt with according to law. The costs of this petition will abide and follow the result and be provided for in the revised decree.

[Section 158: If any party to a suit to whom time has been granted fails to produce his

Court may proceed not- evidence, or to cause the attendance of his witnesses, or to

withstanding either party Perform any other act necessary to the further progress of the

fails to produce evidence, suit for which time has been allowed the Court may not with-

&c. standing such default, proceed to decide the suit forthwith.]

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