1884

QUEEN EMPRESS v. SHIB CHUNDER MITTER.

but in the course of the conversation that followed, when Mr. Allen drew my attention to the book, I think it possible that he and I were speaking of the peon's ability to make the alterations in different senses, he having in his mind the manual ability of the peon to write the figures; I, having in my mind, his ability, depending upon opportunity or facility; and it was with reference to this last ability that I pointed out to the jury, that there was no evidence that the peon had left the shop; while if there was such evidence, the jury would be bound to give it their careful consideration. On the whole, I see no reason to believe that I said to the jury anything that could reasonably have been misunderstood; I may observe in conclusion that I entertain no doubt that the verdict of the jury was correct.

Rule discharged.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

GOWRI KOER (PLAINTIFF) *v* AUDH KOER AND OTHERS (DEFENDANTS.)*

1884 *September* 1

Res-judicata—Decision on a point of law subsequently disapproved of by a Full Bench can be pleaded as res-judicata.

Where a Division Bench of the High Court decided, as a point of law, that a property had not passed under a certain deed of sale, and, subsequently, the decision on that point of law was in another case disapproved of by a Full bench; the decision of the Division Bench, (where the same plaintiff has again sued to recover the same property relying on the same deed of sale), is no less a *res-judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved.

THIS was a suit to recover possession of certain shares in several villages, on the allegation that the plaintiff Gowri Koer had purchased such shares under a kobala, dated the 26th July 1870, from Lalbehari and Ramkhelawan Singh. At the time of the institution of the suit, the vendors were dead, and their sons, and one Audh Koer, who was in possession of some of the property, were made defendants.

* Appeal from Original Decree No. 84 of 1883, against the decree of Babu Koylash Chunder Mukherji, Judge of Tirhoot, dated the 19th of January 1883.

1884

GOWRI KOER v. AUDH KOER.

The plaintiff stated that Lalbehari Singh had acquired the disputed properties as the reversionary heir to Mussamat Narain Koer, the widow of one Jaisredut, and that he (Lalbehari), after having sold the property to her, had, on the 25th December 1881, in fraud of the sale settled these properties on the defendants.

It appeared that in August 1872 the present plaintiff, with Ramkhelawan and Kirit Narain, had instituted a suit against Lalbehari and Audh Koer in substance to obtain, by virtue of an assignment from Lalbehari, possession of these very properties now sued for (of which properties Lalbehari have never had any sort of possession); the suit in its terms was however framed for the purpose of obtaining possession of a portion of the assigned properties, and, also, to obtain a declaration of right of ownership to another portion of which they asserted they were then in possession of. This suit was dismissed by the Court of first instance, and, on the 11th December 1873 the High Court on appeal, *Ram Khelawan Singh* v. *Oudh Koer* (1), affirmed that decision, stating *that Lalbehari, at the time that the assignment to Ramkhelawan, Kirit Lall and Gowri Koer had been made, had never been in possession of the properties assigned, and that he could not, therefore, pass the property; that under such circumstances the assignments were only evidence of contracts to be performed in the future, and upon the happening of a contingency of which the purchaser might possibly claim specific performance; that before Lalbehari could be in a position to specifically perform his contracts, he must first recover the property from Audh Koer; that possibly a Court of equity, in order to avoid circuity and multiplicity of actions, might rightly allow the plaintiffs in one action to sue Lalbehari for specific performance, and on the footing of his right to sue Audh Koer to cover the property necessary for the performance of those contracts, but that even if the facts had been such as to justify the Court in dealing with the suit in that way, it would have been still incumbent upon the plaintiffs to establish their right to specific performance as against Lalbehari. But inasmuch as the Court found the rights of Ramkhelawan and Kirit Narain against Lalbehari rested upon a different foundation from*

(1) 21 W. R., 101.

1884

GOWRI KOER v. AUDH KOER.

those of Gowri Koer, it held that the suit was bad for misjoinder of causes of action ; the suit was, therefore, dismissed, as far as it regarded the plaintiffs, Ramkhelawan and Kirit Narain, they not having been in a position to obtain specific performance, inasmuch as no consideration for their alleged contracts had been proved ; but as regarded the case of Gowri Koer, it having been alleged that she had paid consideration money for her contract with Lalbehari, it was held that she possibly might have been entitled to specific performance, had she brought the suit against Lalbehari and Ramkhelawan, her joint contractors, but that having only sued Lalbehari, her rights could not be adjudicated upon in that suit, and they dismissed it without prejudice to her right to bring a fresh suit upon the same cause of action.

The plaintiff, relying on her rights being reserved under the decision of the 11th December 1873, brought this present suit for the purposes firstly above mentioned, omitting to frame it as one for specific performance, and the defendants, relying on the effect of the decision of 1873 (which is fully set out in 21 W. R., 101) set up that decision as a plea in bar to the plaintiff's suit.

The Subordinate Judge held as to the question of *res-judicata*, that the suit was not barred by s. 13 of the Code, for although the disputed properties had been the subject of previous litigation, and the present plaintiff's suit had been dismissed by the High Court, yet the validity of her present kobala had never been finally determined in that suit, the suit having been thrown out for misjoinder of causes of action, and dismissed without prejudice to her right to bring a fresh suit upon the same cause of action; but on the merits he decided the case in favor of the defendants.

The plaintiff appealed to the High Court, and the defendants cross appealed as regarded the question of *res-judicata*.

Mr. *O. C. Mullick*, Babu *Chunder Madhub Ghose*, and Babu *Koruna Sindhoo Mukerji* for the appellant.

The *Advocate-General* (Mr. *Paul*), Mr. *Evans*, Mr. *C. Gregory*, Babu *Mohesh Chunder Chowdhry*, Babu *Umakali Mookerji* and Babu *Aubinash Chunder Banerji* for the respondents.

The judgment of the Court was delivered by

1884

GOWRI KOER v. AUDH KOER.

GARTH, C.J.—The plaintiff in this suit seeks to recover certain property under a deed, dated the 26th July 1870, by which it was conveyed to her by two persons, named Ramkhelawan and Lalbehari.

Lalbehari, it was said, inherited it from a lady named Narain Koer, who died about the month of March 1870. Ramkhelawan had derived a portion of the property from him, and they both professed by this deed of sale to convey the property to the plaintiff.

It seems that, in the year 1871, the plaintiff, as well as Ramkhelawan and Lalbehari, brought a suit against the defendant, Mussamat Audh Koer, to recover this very property, and her suit was dismissed. The case then came up before the High Court, who affirmed the decree of the Court below.

There are, therefore, at the threshold of the case, two points which the plaintiff has to establish: In the first place, she must show that the decree which was pronounced in the suit of 1871 is not a *res-judicata* in this suit; and in the next place, she must show that the deed of 26th July 1870, under which she claims, is a *bonâ-fide* conveyance.

I will deal first with the question of *res-judicata*.

The suit of 1871 was brought, as I have already said, by the plaintiff and her vendors, under the deed of 1870, to recover possession of the property from Mussamat Audh Koer; and the Judges in the High Court, who heard the case, decided against the claim of the present plaintiff, upon the ground that nothing could have passed under the deed of 1870, inasmuch as the vendors had not the property in their possession. And they cited as an authority for that proposition two cases in the Privy Council—*Ranee Bhobosoonderee Dasseah* v. *Issur Chunder Dutt* (1), *Raja Sahib Prahlad Sen* v. *Baboo Budhu Singh* (2)—which have been since considered in this Court by a Full Bench, *Narain Chunder Chuckerbutty* v. *Dataram Roy* (3), which decided that the Privy Council did not mean to lay down any rule of the kind.

(1) 11 B. L. R., 36.
(2) 2 B. L. R., 117.
(3) I. L. R. 8 Calc., 577.

The learned Judges, however, in the suit of 1871, having decided upon this ground, go on to suggest in what way the suit might possibly have been brought.

They say that "possibly a Court of equity, in order to avoid circuity and multiplicity of action might rightly have allowed the plaintiffs in one action, to sue Lalbehari for specific performance of their contract with him, and also upon the footing of his right to sue Mussamat Audh Koer, to recover that property needed for the performance of the contract."

But they go on to say that as the suit which had been brought was not of that character, and as they could not deal with the case as if it were a suit of that kind, they must dismiss the suit upon the first ground, namely, that nothing passed to the plaintiff under the conveyance of the 26th of July 1870.

At the same time they say that their decision is not to affect her right, if any, to bring a suit for specific performance, should she think fit to do so.

This we take to be the true meaning of their decision; and it therefore amounts to a judgment, that the plaintiff could not recover under the deed of 1870, because that deed passed nothing.

It is true, that since that time a Full Bench of this Court have considered that the law, as laid down by these learned Judges, was incorrect. We held, that although a person may not have property in his possession, he is nevertheless competent to convey it; and we considered that the cases in the Privy Council were by no means opposed to that view of the law.

But although those learned Judges may have made a mistake in point of law, in the decision at which they arrived in 1873, their decision upon the point at issue is nevertheless a *res-judicata* as between the parties, and it is no less a *res-judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which this Court has subsequently disapproved.

We consider, therefore, that this point must be decided against the plaintiff, and that is fatal to her suit.

[The learned Judge then entered into the merits of the case, and decided that the appeal by the plaintiff must also be dismissed on the merits.]

Appeal dismissed.