1888

QUEEN-EMPRESS v. LAL SAHAI.

in a conspiracy, not only between themselves, but with the police for the purpose of procuring the conviction and execution of an innocent man for their sister's murder. Whatever may have been the motive which led the unfortunate deceased to go from her old house at Lalgaon to her brother's house to Garahya, I cannot pretend to say, for I have no reliable information before me upon the subject. But that the appellant followed her and that he was constantly endeavouring to get her to go back to Lalgaon is a matter about which I entertain no doubt, or that on her refusal to do so he resolved to put her out of the way and did so. The murder was a very cruel and cowardly one perpetrated upon a sleeping and defenceless woman, and there are no circumstances of extenuation whatever which would justify me in mitigating the extreme penalty which the learned Judge, with whom the assessors agreed in convicting, passed upon the appellant. The appeal is dismissed, the sentence confirmed, and I direct that it be carried into execution, and I further direct that the appellant be taken back to the jail from which he came for the purpose of the sentence being carried out.

TYRRELL, J.—I concur.

Appeal dismissed and sentence confirmed.

FULL BENCH.

1888
November 15.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

SUKH LAL (DEFENDANT) *v.* BHIKHI (PLAINTIFF).*

Civil Procedure Code, ss. 13, 373—*Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter—Res judicata.*

A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—"This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammat Lachminia in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another

1888

SUKH LAL v. BHIKHI.

suit upon the same title to recover possession of the one-third share referred to in the order just quoted.

Held by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect; that as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision within s. 13 of the Civil Procedure Code; and the present suit was consequently barred as *res judicata*. *Kudrat* v. *Dinu* (1), *Ganesh Rai* v. *Kalka Prasad* (2), *Salig Ram Pathak* v. *Tirbhawan Pathak* (3) and *Muhammad Salim* v. *Nabian Bibi* (4) explained.

This was a reference to the Full Bench of an appeal which originally came for hearing before Mahmood, J. The facts are sufficiently stated in the judgment of Edge, C. J.

Mr. *Niblett*, for the appellant.

Mr. *Simeon*, for the respondent.

EDGE, C. J.—The plaintiff in this case brought an action to recover certain plots of land. He was met by the defence of *res judicata*. That defence arose in this way. The present plaintiff had previously brought an action against these defendants for 6 bighas odd of land, the title alleged by him being a sale-deed from one Musammat Lachminia. In that action the Munsif had held that the plaintiff had not made out his title to the whole of the land claimed, although he had proved title to a one-third share of the land then in suit. He dismissed the action, but included in his decree an order in these terms:—

"This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammat Lachminia in the fields specified in the deed of sale, dated 18th February, 1884."

That decree was not appealed from; and subsequently the present action was brought for that one-third interest of Musammat Lachminia which was referred to in the decree of the Munsif in the previous case. The Subordinate Judge on appeal in this case held

(1) I. L. R., 9 All., 155.
(2) I. L. R., 5 All., 595.
(3) Weekly Notes, 1885, p. 171.
(4) I. L. R., 8 All., 282.

that s. 13 of the Code of Civil Procedure did not apply. From his decree the defendants appealed. It is not contended on behalf of the respondent here, the plaintiff, that this order was one made under s. 373 of the Code of Civil Procedure. Indeed, it could not be contended that s. 373 could apply, inasmuch as no application was made in the prior suit by the plaintiff for liberty to withdraw from or abandon any portion of his claim. Further, the decree in the prior suit was one of dismissal and not in the nature of an order allowing the plaintiff to withdraw or abandon his claim with leave to bring a fresh action.

It appears to me that the Munsif probably thought that he could pass a decree which would operate as a non-suit did formerly in an English Court. It has been decided by the Privy Council, and we, of course, followed that decision in the case of *Banwari Das* v. *Muhammad Mashiat* (1), that there is no power in any Court in India to pass a decree in the nature of a non-suit.

It has been contended on behalf of the respondent that I have already decided that where a reservation, such as there is here, appears in a decree, that reservation enables the then unsuccessful party to maintain a fresh suit. That contention is based on the following passage in my judgment in *Kudrat* v. *Dinu* (2) :—"The Munsif in dismissing the suit did not reserve to the respondents the right to bring a frest action." It is contended that that passage means that if the Munsif, while dismissing the suit, had reserved to the respondents the right to bring a fresh suit, the respondents would have been entitled to maintain such an action. The passage to which I have referred was an answer to one of the arguments put before us in that case, namely, that the judgment or decree in that case did include such a reservation: and the passage above quoted was merely intended as a negation of that suggestion, and not as throwing out any suggestion that if such a reservation had been made, it would have had any effect in law. The Munsif here had, in the first case, no power to make any such reservation or order as appears in his decree. His including that order in his decree was

(1) I. L. R., 9 All., 690. (2) I. L. R., 9 All., 155.

1888

SUKH LAL v. BHIKHI.

in excess of any powers which any Judge in India has; and that portion of the decree, although not appealed against, might be treated, in my opinion, as an absolute nullity. The Munsif could not by the insertion of such words in his decree create in India a decree of non-suit which is not provided for by law, and which the Privy Council has expressly ruled does not exist in India.

Consequently I am of opinion that the fact that that decree was not appealed against, does not give that order contained in it any effect.

The only other point raised on behalf of the respondent is, whether *this* was a case falling within s. 13. In the former case, as I have said, the plaintiff sued for 6 bighas odd of land on the same title as that upon which he comes into Court to-day. In that former suit he could have obtained, if the Munsif had decided rightly in law, a decree for the one-third interest to which he had established his right. So that in fact the relief regarding the one-third interest was a relief which he could have obtained in the former suit, exactly upon the same title upon which he has brought his present suit. Because the Munsif wrongly dismissed his whole claim instead of granting him relief in respect of the one-third interest to which he was entitled, it does not render the decision in the former case any the less a decision coming within s. 13 of the Civil Procedure Code.

I am of opinion, therefore, that this appeal should be allowed with costs, and the judgment and the decree of the Court below being reversed, the suit should stand dismissed with costs in all Courts.

TYRRELL, J.—I understand that the reason for this reference is to be found in the last paragraph of my brother Mahmood's order of the 30th July, 1888, where he says:—"The earliest ruling is *Ganesh Rai* v. *Kalka Prasad* (1), which was dissented from by Oldfield, J., in *Salig Ram Pathak* v. *Tirbhawan Pathak* (2), and I concurred in his judgment. For the second time that ruling was

(1) I. L. R., 5 All., 535. (2) Weekly Notes, 1885, p. 171.

dissented from by me in *Muhammad Salim* v. *Nabian Bibi* (1) and Oldfield, J., concurred with me. The last case is *Kudrat* v. *Dinu* (2) in which the learned Chief Justice made no reference in his judgment to the earlier rulings, but my brother Tyrrell in explaining his ruling in *Ganesh Rai* v. *Kalka Prasad* (3) seemed to think that Oldfield, J., and myself had misunderstood its effect when we dissented from it."

I endeavoured in my judgment in *Kudrat* v. *Dinu* (2) to explain how the case of *Ganesh Rai* v. *Kalka Prasad* (3) differed essentially and also in its particulars from the case of *Salig Ram Pathak* v. *Tirbhawan Pathak* (4) and of *Muhammad Salim* v. *Nabian Bibi* (1). I pointed out that in respect of *Ganesh Rai* v. *Kalka Prasad* (3) the Court in the previous action which was pleaded in bar under s. 13, Civil Procedure Code, had heard the parties, had framed issues, had taken evidence and proceeded to decree under Chapter 17 of the Civil Procedure Code. I said :—" I fully concur, and would only add that this suit is exactly similar to *Ganesh Rai* v. *Kalka Prasad* (3). The ruling in that case has been questioned subsequently by Mr. Justice Mahmood—*Muhammad Salim* v. *Nabian Bibi* (1)—who dissented from the law as laid down therein. But the learned Judge did not discern that the case of *Ganesh Rai* v. *Kalka Prasad* (3) was essentially distinguished from the three cases he had to determine. In *Ganesh Rai* v. *Kalka Prasad* (3) the Court had heard the parties, framed issues after taking evidence, and proceeded to judgment. In the cases before Mahmood, J., the plaintiff was non-suited on the preliminary ground of misjoinder."

I may add now that the judgment in *Ganesh Rai* v. *Kalka Prasad* (3) was against the plaintiff on this ground. The Munsif found that his title was contained in a sale-certificate. The Munsif thought that this being so, the plaintiff was disqualified from proving his title *aliunde* : and holding that the sale-certificate was one of those documents which could not be received in evidence after the filing of the plaint, he dismissed the plaintiff's suit for want of evidence and decreed accordingly under Chapter 17 of the Civil

(1) I. L. R., 8 All., 282. (2) I. L. R., 9 All., 155.
(3) I. L. R., 5 All. 595. (4) Weekly Notes, 1883, p. 171.

1888

SUKH LAL v. BHIKHI.

Procedure Code. Now in the case of *Salig Ram Pathak* v. *Tirbhawan Pathak* (1) my brother Oldfield in his judgment stated that the previous "suit was dismissed on a preliminary and technical point, and there was no hearing or decision of the matter in issue in that suit, nor indeed was there any intention on the part of the Court to hear and decide it; the Court, in fact, refused to do so." The report states that the defect was misjoinder for want of all the proper parties.

Again in *Muhammad Salim* v. *Nabian Bibi* (2) my brother Mahmood wrote in his judgment that the previous "suit was dismissed on the ground of misjoinder, and also because the suit was undervalued, and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court." The learned Judge further found that the suit had, in fact, been dismissed under s. 10 of the Court-Fees Act. The case was disposed of in the manner contemplated by the fourth Chapter of the Civil Procedure Code. However, it appears that at the hearing of both those cases the ruling contained in *Ganesh Rai* v. *Kalka Prasad* (3) was cited and relied upon, as if it was on all fours with the two other cases. In the former of the two, *i.e.*, in *Salig Ram Pathak* v. *Tirbhawan Pathak* (1) my brother Oldfield said: "I am unable to concur in the opinion expressed by the learned Judges in the case cited by the Judge, and the view I have taken is supported by numerous decisions." In the other case, that is to say, in the case of *Muhammad Salim* v. *Nabian Bibi* (2) my brother Mahmood at the conclusion of his judgment said: "*Res judicata dicitur quae finem controversiarum pronuntiatione judicis accepit quod vel condemnatione vel absolutione contingit* (Dig. XLII, Tit. I. Sec. I). The case of *Ganesh Rai* v. *Kalka Prasad* already referred to ignores this fundamental principle of law; and this is not the first occasion upon which my learned brother Oldfield and myself have expressed our dissent from that ruling, and we did so before in a case—*Salig Ram* v. *Tirbhawan Pathak*, (1) in which the point for determination was very similar to this case."

(1) Weekly Notes, 1885, p. 171. (2) I. L. R., 8 All. 282.
(3) I. L. R., 5 All. 595.

1888

SUKH LAL v. BHIKHI.

As I have pointed out above, it has hitherto seemed to me and it still seems to me that there is no similarity between those cases. But it is possible that the learned Judges in question were misled by the reporting of the facts of the case of *Ganesh Rai* v. *Kalka Prasad* (1). The report represents in that case that the Munsif "dismissed it on the 23rd May, 1881, in the form in which it was brought *(ba haisiyat maujuda)*, on the ground that the plaintiff had not filed his certificate of sale with the plaint." This is an insufficient, if not an incorrect description of the case of *Ganesh Rai* v. *Kalka Prasad* (1). I have now endeavoured again to explain why I have thought this last mentioned case was not on all fours with the cases before my brother Mahmood, but essentially distinguishable from them. I have only now to say that I entirely concur with the judgment and the order of the learned Chief Justice.

MAHMOOD, J.—The facts of this case are fully stated in my order of reference of the 30th July, 1888, which I passed after obtaining the learned Chief Justice's permission to refer this case, which I may call a very simple case, to a Bench of more than two Judges. It was by an order of the learned Chief Justice that the case was laid before this Bench. I confess frankly that I should not have passed that order without much greater hesitation than I have had, because throughout the whole argument that was addressed to me by the learned pleaders of the parties, I regarded the question raised as a simple question which was an elementary proposition of law, after the numerous amount of case authority that existed on the point. That question has been mentioned by the learned Chief Justice, and I have only to add that I agree in the conclusions arrived at by him.

But the only justification which I could have had to take up the time of three Judges can be best explained by saying that I am glad to find that my brother Tyrrell has now pointed out that the report of the case of *Ganesh Rai* v. *Kalka Prasad* (1) misled not only me for the first time, but our late colleague Oldfield, J., in the case of *Salig Ram* v. *Tirbhawan* (2), and also misled both him and me in a second

(1) I. L. R., 5 All. 505. (2) Weekly Notes, 1885, p. 171.

1888

SUKH LAL v. BHIKHI.

case. Further I may be allowed to observe that similar was the difficulty which arose in the case of *Kudrat* v. *Dinu* (1). If I could have understood those rulings in the sense in which my learned brother has now explained them, I should not have considered it necessary to entertain an apprehension that there was any conflict of opinion in this Court upon the question of law dwelt upon and decided by me in *Muhammad Salim* v. *Nabian Bibi* (2). To those views I still adhere, and if the smallest disagreement existed upon the Bench in this case, I should have considered it my duty to show more clearly that where an issue has been raised and evidence received and adjudication arrived at, the suit does become a *res judicata*, and *Muhammad Salim* v. *Nabian Bibi* (2) is not opposed to that view. It would be simple expenditure of time to consider the matter further, because I concur in the learned Chief Justice's judgment in the case of *Kudrat* v. *Dinu* (1), and I concur in the view which he has expressed in this case.

I may, however, add for the sake of further accuracy and of the importance to be attached to head-notes, that the head-note in *Muhammad Salim* v. *Nabian Bibi* (2) represents me as holding that the words "*ba kaisiyat maujuda*" must be taken as amounting to a permission to the plaintiff to bring another suit, within the meaning of s. 373, Civil Procedure Code. The note goes beyond what I said in any portion of my judgment in that case.

Appeal allowed.

FULL BENCH.

1888

December 7.

Before Sir John Edge Kt. Chief Justice, Mr. Justice Tyrrell and Mr. Justice Mahmood.

JANKI (PLAINTIFF) *v.* NAND RAM AND ANOTHER (DEFENDANTS).*

Hindu law—Joint Hindu family—Hindu widow—Maintenance—Suit by sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death and therefore before devolution of father's self-acquired estate.—"Ancestral property"—Legal obligation of heir to fulfil moral obligations of last proprietor.

In a Hindu family governed by the Mitakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain

(1) I. L. R., 9 All., 155. (2) I. L. R., 8 All., 282.