PRIVY COUNCIL.

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July 12.

RADHA PRASAD SINGH, (DEFENDANT) *v.* LAL SAHAB RAI AND OTHERS, (PLAINTIFFS).

[On appeal from the High Court for the North-Western Provinces.]

Civil Procedure Code, ss. 13, 43—*Res judicata—Ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees, and effect, in execution, of his representatives not being parties to the operative one—Mesne profits—Parties—Non-joinder.*

The dismissal of a suit to have set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under ss. 13 and 43, Civil Procedure, to another suit to obtain relief against an order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order or sale against which the dismissed suit was directed.

An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.

The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors, was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs of the original judgment-debtors.

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Before the issue of a money decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it (1).

Present: LORD WATSON, SIR B. PEACOCK, AND SIR R. COUCH.

(1) S. 255 of Act X of 1877 (30th March 1877) enacted that if the decree be for mesne profits, or any other matter the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

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CONSOLIDATED appeal from two decrees (4th May 1887) of the High Court, one of which reversed a decree (21st July 1885) of the Subordinate Judge of Gházipur and decreed the claim of the present respondent. The other dismissed a cross appeal preferred by this appellant to the High Court.

The plaintiffs, in the suit out of which this appeal arose, and their predecessors in estate, were pattidárs of village Narhi, in the Gházipur district, their village having originally comprised mauza Umarpur, which, about the year 1840, was cut away from Narhi by the river Ganges, re-appearing some years after as diyara, or alluvial land, on the opposite, or Shahabad, side of the river. The defendant was the Mahárája Radha Prasad Singh, the proprietor of taluk Majhariya, in the Shahabad district. The litigation which took place about Umarpur diyara, between the defendant's father and the proprietors of Narhi, 264 in number, is stated in the judgment of the Sadar Diwani Adalat of 29th November 1859, reported in the S. D. A. reports for that year. The result was a decree in favour of the Maharaja, for the possession, with mesne profits, of about 1,589 bighas, and he obtained possession in 1874. Meantime, an order of the Government had placed Umarpur diyara within the jurisdiction of the Shahabad district. On the 1st March 1877 a decree was made by the Shahabad Court fixing the amount of mesne profits and costs at Rs. 10,69,667, to satisfy which, an order was made in June 1878, also by the Shahabad Court, for the attachment of the interest of the decree debtors in Umarpur. On the 23rd June 1880, the present respondents filed their plaint against this appellant (who had succeeded his father as talúkdár) in the Court of the Subordinate Judge of Shahabad to have set aside the sale of their share in Umarpur, on the ground that neither they, nor any of their ancestors, were judgment-debtors in the decree held by the Mahárája. On the 21st July 1881, the Subordinate Judge dismissed that suit, with costs on grounds which he stated thus :—

"The case having come on to-day, an application has been made that the plaintiffs being residents of another district on the other side of the river could not attend, for what reason it was not

known, and it prayed for one month's time, and for the appointment of another date. This is not a sufficient cause. Two weeks have passed since the framing of the issues and the plaintiffs have done nothing towards the conduct of their case. Now one month's time cannot be allowed. The case should be dismissed for want of evidence."

The case having thus terminated in Shahabad, afterwards, on the 10th March 1881, the District Judge of Gházipur made an order, on the application of the Mahárája, for execution of the decree of 1877, by attachment of lands in Narhi. Objections having been disallowed, the plaintiffs in this suit, describing themselves as "sons of Jaiparkash," who, in fact, was the son of Jhanguri, brought this suit on 3rd March 1882. They claimed to be entitled as village shareholders to shares in Narhi, asli and dákhili, valued at Rs. 74,888, alleging that neither they nor their ancestors were liable for the mesne profits. The Mahárája's defence was that they were. Execution proceedings had all along been taken against Jhanguri Rai, son of Achraj, as well as other proprietors; and it was contended that it was Jhanguri's son, Jaiparkash, whom the plaintiffs represented. The defence also relied on the dismissal of the suit which had been brought in 1882 in the Shahabad Court, as barring this suit; and on this latter ground the suit was, in the first instance, dismissed by the Subordinate Judge of Gházipur, whose decree, however, was on appeal reversed by the High Court, the suit being remanded for hearing on the merits.

On that remand the first Court held that the respondents' "ancestor" or grandfather, Jhanguri, had been a defendant in the suit in which this appellant's decree had been obtained, and that, therefore, his share of one moiety of the properties in suit was liable to be sold in execution of that decree, but that the other half, which under Hindu law belonged to the respondents as grandsons of Jhanguri, was not so liable; and the first Court, accordingly, gave the respondents a decree for the latter half, and declared the other half liable to sale in execution of this appellant's decree.

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Against that decree an appeal and cross appeal were preferred, on which the High Court remanded the suit for the determination and report of the first Court on three issues which were sent down for the purpose of ascertaining more perfectly whether Jhanguri, the respondents' grandfather, was a defendant in the suit, and whether process was served on him, and whether he or his son, Jaiparkash, the respondents' father, or the respondents were parties, at any time, and when, to the execution proceedings prior to the 12th July 1874, the date on which possession was obtained by this appellant of the decreed lands in respect of which the mesne profits were demanded.

On this remand, the first Court took further evidence, and reported that it was shown that Jhanguri, the respondents' grandfather, was at the time of the institution of the suit in which this appellant's decree was obtained, a coparcener, and in possession of the lands decreed; but that this appellant, on whom the High Court had cast the burden of proof, had not satisfactorily shown that any process issued to Jhanguri in that suit, or that any proceedings in execution had been taken against the respondents, or their ancestor, before the 1st of March 1881.

Objections and cross objections were taken to this report, which was returned to the High Court, and the case was re-argued.

The judgment of the High Court, delivered by STRAIGHT, J., concluded thus:—

"To sum the matter up, it comes to this, that the defendant says because there was a mention of the name of Jhanguri, who had a share in this particular village in the year 1856, and because all the co-sharers must be presumed to have been cited in that suit, and because a Jhanguri appears in the decree and in the subsequent execution proceedings, therefore it must be presumed that that Jhanguri is the grandfather of the present plaintiffs. On the other side, the plaintiffs say, and I think with justice, that it is by no means clear that Jhanguri was in existence in the year 1856; there is no proof that he was served with process in that suit before the decree was passed, or that he was subsequently made a party to any

proceedings in execution of the decree: and in this respect the contention is supported more or less by the absence from the decree of any parentage of Jhanguri, and the same remark applies to the execution proceedings, so that under these circumstances it does seem to me to be asking us to take a leap in the dark to come to the conclusion upon such materials that this particular Jhanguri whose name appeared in that decree must necessarily be the Jhanguri the grandfather of the plaintiffs in the present suit. It was urged for the defendant that by the name of Jhanguri appearing in or being mixed up with the names of the other members of the family who were cited in this suit, it must follow that he was the Jhanguri the ancestor of the plaintiffs. I confess it would be going a great deal too far, where there are so many Jhanguris appearing in the decree, and so many repetitions of other names, to come to the conclusion that he was the person the defendant says he was. I think I have said sufficient to explain why I think that there is no clear, satisfactory, or convincing proof which would warrant me in allowing the defendant to proceed with the execution of the decree against the property which is now in the possession of the present plaintiffs."

The decree of the High Court was accordingly in favour of the plaintiffs.

Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellant, referred to the decision of the Subordinate Judge of Shahabad of 21st July 1881, dismissing the plaintiffs' suit in that Court; and they referred to ss. 13, explanation 4, and 43 of the Civil Procedure. They also adverted to the evidence relating to Jhanguri having been a party to the decree of 14th April 1856. They contended that had remained a pattidár and coparcener of Narhi, and that the entire interest of the plaintiffs in their ancestral lands was liable to attachment in execution of the decree.

Mr. *J. Graham*, Q. C., and Mr. *H. Cowell* for the respondents, argued that they were not affected by the decree of 1856 or bound by any of the proceedings taken under it. The proceedings taken by the defendant on the 1st March 1881 were not preceded by

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any judicial finding that the present plaintiff represented the real judgment-debtors. The decision of the Shahabad Court had determined none of the issues in the present case and did not constitute *res judicata*.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by LORD WATSON.

LORD WATSON.—The suit in which these consolidated appeals are taken was instituted by Lal Sahab Rai and others, the respondents, before the Subordinate Judge of Gházipur in March 1882, for the purpose of obtaining relief against the attachment and sale, at the instance of the Mahárája Radha Prasad Singh, the appellant, of certain shares of immoveable estate in talúka Narhi and elsewhere, in satisfaction of a judgment debt alleged to be due from their ancestor Jhanguri Rai. The respondents are the six sons of Jaipargash, the only son of Jhanguri, who was one of the five sons of Achraj Rai, a pattidár of Narhi; and the shares sold in execution by the appellant were the ancestral property of the respondents, being one-fifth of the interest which belonged to their great-grandfather, Achraj Rai.

In order to appreciate the relative position of the litigants and the merits of the controversy raised by these appeals, it is necessary to revert to the legal proceedings in which the decrees were obtained which formed the warrant for the attachment and sale against which relief is sought.

Talúk Majharya, now belonging to the appellant, and talúk Narhi, already mentioned, are situated on opposite banks of the Ganges, Majharya being on the Shahabad and Narhi on the Gházipur side of the river. Disputes arose between the proprietors of these two talúks with respect to the ownership of 1,589 bighas of alluvial land which had been deposited by the action of the river on its Shahabad side, the proprietors of Narhi, who appear to have been in possession, alleging that the disputed land was a reformation upon a denuded area which originally formed part of their talúk. Consequently the Mahárája Búkhsh Singh, father and imme-

diate predecessor of the appellant, brought, in 1855, an action against 264 defendants pattidárs of Narhi before the Civil Court of Gházipur for recovery of the disputed bíghas and for mesne profits. The judicial record of that action perished in the Mutiny, but copies of the written statement lodged for 57 pattidárs who appeared to defend, of their petition for leave to file documents, and of the ultimate decree passed by the Civil Judge of Gházipur, have been produced and admitted without objection in this suit.

The decree, which is dated the 14th April 1856, assigned the disputed land to the Mahárája, and fixed its boundaries; and also found that he was "entitled to mesne profits from the date of the Deputy Collector's order until he recovers possession." An appeal was taken by some of the defendants to the Sadar Court, who, on the 29th November 1859, varied the boundaries fixed by the Subordinate Judge favourably to the defendants, and directed "that mesne profits be adjusted accordingly." The Mahárája presented a petition for review, upon which the Sadar Court, on the 7th April 1860, modified its previous decision with respect to boundaries, in his favour. An appeal was then taken by the defendants to this Board, which was dismissed on the 31st March 1870 for want of prosecution. It is unnecessary to notice farther these proceedings by way of appeal, because the decrees pronounced in them had reference merely to the extent of the land which the Mahárája was entitled to recover, and did not disturb the general finding of the Subordinate Judge of Gházipur in regard to mesne profits.

It having been judicially determined that the disputed land formed part of talúk Majharya, the action was, after the dismissal of the appeal to this Board, transferred to the Court of Shahabad, the district in which that talúk is situated. In 1874 the Mahárája was put in possession of the land in pursuance of the decree of the Sadar Court; but the question of mesne profits was not finally disposed of until 1877. On the 1st March 1877 the Subordinate Judge issued an order, which has become final, fixing the amount of mesne profits and costs due to the appellant as successor of the Mahárája at Rs. 10,69,667, for which he gave decree jointly against

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all the parties whose names then appeared as defendants to the action.

In June 1878 an order issued from the Shahabad Court for attachment of the interests of the judgment-debtors in mahál Umarpur, in satisfaction of these mesne profits and costs of suit. In the course of the proceedings the respondents applied to have a 2 ganda 2 kauri 2¼ dant share, which they alleged to belong to them, struck out of the inventory; but their objection was overruled, and the property sold in execution. The respondents then brought a regular suit for relief against the attachment and sale, in which they alleged that their share of the mahál was ancestral property, and that neither they nor their ancestors were judgment-debtors in the decree executed, or in any way liable under it. The suit was resisted by the appellant, on the grounds that the respondents had no interest in Umarpur, and that they were not the representatives of Jhanguri and Jaipargash. After adjustment of issues the action was dismissed with costs, on the 21st July 1881, because of the respondents' failure to adduce evidence in support of their allegations; and the respondents took no steps to set aside that order, which has consequently become final. It would hardly have been necessary to refer to these proceedings in execution, had it not been for the fact that the appellant relies upon them as constituting *res judicata* in the present suit.

On the 1st March 1881, the appellant instituted proceedings for execution in the Court of Gházipur against property of the judgment-debtors situated in that district, stating in his application (1) the names of the judgment-debtors, and (2) the names of those against whom his decree was sought to be executed. Amongst the former there occurs the name of "Chakauri Rai," which is synonymous with "Jhanguri Rai;" and amongst the latter the names of all the respondents, who are described as "sons of Jaipargash Rai, deceased, heirs of Chakauri Rai, grandson of Achraj Rai." So that in these proceedings the appellant rightly attributed to the respondents the character of heirs of Jhanguri and Jaipargash, which he denied that they possessed in his previous execution suit. The

respondents lodged objections, praying for release of their interest, on the ground that it belonged to them, "and they were in possession thereof, and the judgment-debtors had no concern with it;" but these objections were repelled by the Subordinate Judge of Gházipur, on the 10th March 1881, in respect of their having been once before raised by the same persons in the Court of the Sub-Judge of Shahabad and there disallowed.

On the 3rd March 1882 the respondents brought the present suit, in which there has been an unusual amount of litigation. Their cause of action is thus stated in the plaint:—"The judgment-debtors have no connection or concern with this property, nor are the plaintiffs or their ancestors debtors under the decree under execution." In his written statement the appellant averred that the decree of 14th April 1856, and subsequent proceedings in execution, were taken against Jhanguri Rai and his son, Jaipargash Rai, and that these persons being judgment-debtors, the property, being ancestral, was liable to attachment for their debt. He also pleaded that, according to the provisions of sections 13 and 43 of Act X of 1877, the claim put forward by the respondents was no longer cognizable, inasmuch as it had already been adjudicated upon, in a regular suit, before the District Court of Shahabad.

The cause was tried upon six issues, which need only be noticed in so far as they relate to the main question raised in these appeals:—

"III. Is the claim of the plaintiffs barred by sections 13 and 43 of the Code of Civil Procedure?

"IV. Are the plaintiffs or their ancestors liable for the judgment debt, and is the property liable to sale or not?"

The Subordinate Judge, upon the 21st December 1882, sustained the appellant's plea in bar, and dismissed the suit with costs. His decree was carried by appeal to the High Court of the North-Western Provinces, by whom it was reversed on the 9th May 1885, and the case remanded to the Sub-Judge for disposal on the merits.

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As the decision of the High Court on that occasion has been impeached in these appeals, it may be convenient to state here that, in the opinion of their Lordships, it was well founded. None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined 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 Court. It must fall within one or other of the sections of Chapter VII of the Code; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief. Assuming that the respondents are barred from seeking relief against the attachment and sale of their interest in mahál Umarpur, the decree of 21st July 1881 does not disable them from claiming relief against the attachment and sale of their interest in Narhi, or in any other property which was not included in the judicial sale of Umarpur.

Acting under the remit made to him by the High Court, the Subordinate Judge, on the 21st July 1885, found as matter of fact that the respondents' ancestor, Jhanguri Rai, was defendant in the suit of 1855, and was one of the parties decerned against, as liable for mesne profits by the judgment of the 14th April 1856. Upon that finding the learned Judge dismissed the respondents' suit with respect to one-half of the interests claimed by them, but sustained it with respect to the other half, which he held to have been vested, by force of Hindu law, in their father, Jaipargash, who was admittedly not made a party to the proceedings of 1855 and 1856 at the instance of the Mahárája. Against that decision both parties appealed to the High Court, who, on the 5th August 1886, made an order remanding the case for the trial of the following points, and distinct findings upon them :—

(1) Was Jhanguri Rai, the grandfather of the plaintiffs, a co-sharer or in possession of the lands to which the litigation of 1855 related, and which ended in the decree of 14th April 1856 ?

(2) If so, was any process of Court in that litigation issued or served upon him?

(3) When did the defendant first seek to execute his decree against the plaintiffs, either at Ghâzipur or Shahabad; and were they or any of their ancestors, *viz.*, Jaipargash or Jhanguri, parties to the execution proceedings which ended in possession of the property in suit, to which the decree of 1856 related, being given to the defendant by proceedings which ended on the 12th July 1874?

Their Lordships entertain serious doubts whether the Court was justified in making the remand, by the provisions of section 566 of the Civil Procedure Code. All the points remitted were substantially covered by the issues which had been previously sent for trial in the Court below; and it appears to their Lordships that there were sufficient materials for the decision of the case, to which little or nothing has been added by the evidence taken on remand.

On the 20th November 1886 the Subordinate Judge found upon the several points refered to him by the High Court. Upon the first point he found that Jhanguri was a coparcener and in possession at the dates specified; upon the second, that the issue of process to Jhanguri was not proved; and, upon the third, that it was not clearly proved that Jhanguri was a party to the proceedings in execution which resulted in possession of the disputed property being given to the Mahárája in the year 1874.

These findings, together with the oral evidence taken on remand, were duly submitted to the High Court, who, on the 4th May 1887, reversed the Subordinate Judge's decree of the 21st July 1885, and gave judgment for the respondents in terms of their plaint with costs. The decision of the Court was delivered by Mr. Justice Straight, Mahmood, J., concurring. Their Lordships agree with the conclusion at which these learned Judges arrived, although they are unable to concur in all the reasoning upon which it is based. Mr. Justice Straight says, with reference to a statement made by the respondents' pleader on the 27th September 1882, "It seems to me, so far as the plaintiffs were then concerned or are concerned

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now, the sole position for which they have contended was that their ancestor, Jhanguri, was not the judgment-debtor under the decree of the 14th April 1856." And the learned Judge adds "The whole matter, therefore, between the parties resolves itself into the single question of fact,—Was or was not Jhanguri, the ancestor of the plaintiffs, a judgment-debtor under the decree of the 14th April 1856?" The statement in question was not intended to be, and was not, a rehearsal of the whole facts relied on by the plaintiffs, but was made by their pleader in answer to specific questions put to him by the Subordinate Judge; and the issues which went to trial were not confined to that statement, but raised the general question whether the ancestors of the plaintiffs were judgment-debtors under the decree by virtue of which the respondent had attached and sold their interest in the lands of Narhi and others. That misconception of the real issue probably led to the remand of the 5th August 1886, and it certainly induced the High Court, in its ultimate decision upon the merits of the case, to deal with many points which do not appear to their Lordships to require consideration.

The respondents endeavoured to prove that Jhanguri Rai predeceased his father, Achraj, some time before the year 1840; but their evidence on that point does not appear to be reliable, and their Lordships are disposed to think that the Subordinate Judge was right in holding that Jhanguri was a coparcener in possession at the date of the decree of 1856, and was alive for many years afterwards. The terms of that decree, as well as of the written statement for the defendants, and of their petition for leave to file documents,—in all of which the name of Jhanguri occurs in connection with the whole other descendants and heirs of Achraj Rai then in life,—afford *primâ facie* evidence that he was a party to the suit, and was included in the decree itself. Whether that inference is displaced by antecedent evidence derived from the pattidári papers of 1840, their Lordships do not think it necessary to determine. In their opinion, it is an obvious mistake to assume that the right of the appellant to take the respondent's land in execution for mesne profits wholly depends upon the fact of their ancestor being a party

to the decree of 1856. None of the defendants were, by that decree, made judgment-debtors for mesne profits, in the sense that their property could be attached by virtue of it. The decree, no doubt, found that defendants in the suit were accountable for mesne profits, and by that finding they were bound; but it did not ascertain the amount of such profits, or determine the important question whether the defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until March 1877, when for the first time the appellant obtained a money decree which was capable of being put into execution. But, according to the testimony of the appellant's own witnesses, Jhanguri died at least twelve months before that date. It does not clearly appear whether his son, Jaipargash, was then alive; but it is matter of certainty that neither Jaipargash nor the respondents were made parties to the suit in room of Jhanguri.

An operative decree, obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The appellant must pay to the respondents their costs in these appeals.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Burton, Yeates, Hart,* and *Burton.*

Solicitors for the respondents:—Messrs. *Ranken, Ford, Ford,* and *Chester.*