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and 25.

PRIVY COUNCIL.

CHANDI DIN (PLAINTIFF) *v.* NARAINI KUAR (DEFENDANT).

On appeal from the High Court at Allahabad.

Civil Procedure Code ss. 566 *and* 567.—*The framing a new issue by an appellate Court.—Evidence recorded in one suit admitted by consent at the hearing of another.*

In the Court of first instance the appellant, upon the title of a sister's son was one of the plaintiffs who obtained a decree for an inheritance, the suit having been heard at the same time with another, in which relations of the deceased owner, alleging themselves to be of the same *gotra* with him, also obtained a decree as his heirs. Evidence in the latter suit was received in that of the appellant by consent of parties, both suits having been brought against the same defendant, whose title, as widow of a son alleged to have been adopted by the last owner, was set up in both but was not proved.

Appeals having been filed in both suits, in that brought by the sister's son a new issue was framed by the appellate Court, under section 566, Civil Procedure Code as to whether he was entitled as nearest of kin, or was excluded by the other claimants, whose suit was, at that time, compromised.

Held, that, after what had taken place in regard to both suits the appellate Court could frame this issue, although it was new, and had not been raised by the defendant's written answer.

With reference to the evidence in the one suit having been imported as a whole into the other at the first hearing; and the admission of evidence upon the trial of the new issue; it was held, that the parties intended that the evidence should be admitted and that no irregularity had taken place materially affecting the decree of the High Court, which dismissed the suit of the sister's son, on return made under section 567.

Appeal from a decree (17th of December 1886) of the High of Court, reversing, after remand, a decree (22nd of June 1881) of the District Judge of Bareilly.

This appeal was preferred in one of two suits brought by two sets of plaintiffs against the same defendant and transferred from the Court of the Subordinate Judge to that of the District Judge, by whom they were heard together. In one of these suits, *Chandi Din and others* v. *Naraini Kuar* evidence recorded in the other, *Piyare Lal and others* v. *Naraini Kuar*, was admitted by consent.

Present: LORDS HOBHOUSE, MACNAGHTEN and HANNEN, and SIR R. COUCH.

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The principal questions in this appeal were as to the appellate Court having framed a new issue and referred it under section 566 to the original Court; and as to the admission in the one suit of evidence heard in the other.

The facts giving rise to the suit are stated in the report of the appeal in the High Court, *Naraini Kuar* v. *Chandi Din and others* (1).

Both suits were for possession by right of inheritance of ancestral estate consisting of villages, gardens, houses and other properties valued at Rs. 5,84,490, which had belonged to Chaudhri Naubat Ram, a Kanaujia Brahmin of Bareilly, who died in 1867, and to whom the plaintiff-appellant, Chandi Din, was related as sister's son. The plaintiffs in the other suit were Piyare Lal, who died pending the appeal in the High Court, Shib Lal and Bhairon Prasad, descended from an ancestor common to them and to Naubat Ram. In both suits the defence has set up that the defendant, Naraini Kuar, being the widow of the late Raghunandan Ram, who had been the adopted son of Naubat Ram, was, therefore, entitled to the succession; and in Piyare Lal's suit Naraini pleaded that the plaintiffs were strangers, and not related to the family. Not only did the suits differ in respect of the titles set up, but originally there were other co-plaintiffs with Chandi Din, not claiming under his title. These were Mussamat Dayan, who claimed as step-mother of Naubat Ram, and Mashuk, a purchaser of part of the shares claimed by each of the other two plaintiffs. The representatives of this purchaser were parties to this appeal. Dayan withdrew her claim when the suit was first before the District Judge, and the purchaser also abandoned that part of the property to which title had been alleged through her. There being thus, more especially at first, an absence of identity in the plaintiffs' interests, both sets, while the suits were pending in the Court of the Subordinate Judge, on the 4th of July 1879, applied that they might be added as defendants, each set in the suit in which they were not plaintiffs. The order was made in that Court, purporting to be under section 32, Civil Procedure Code, that they should be added as defendants. This order, however,

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was reversed (16th of February 1880) by the High Court (*Pearson* and *Straight, J.J.*), and the Judgment is here given, as it may be considered relevant to this report, and is of importance in the branch of procedure to which it relates. *Straight, J.*, said:—

"Apart from all questions of inconvenience or embarrassment to the principal defendant in the conduct of her defence should she fail to establish the adoption on which the whole fabric of her case rests, I do not see how, as between the plaintiffs and the joined defendants, no matter in which case, any decision that can be passed will estop either of them from subsequent assertion of their rights against one another in a separate suit. It does not appear to me that the plaintiffs in either case could have joined the other plaintiffs in their original plaint as defendants, for they sought no relief against them, and the relief they did seek against Musammat Naraini Kuar was not, in the sense of section 28, in respect 'of the same matter.' The joinder of the two sets of plaintiffs as defendants, in accordance with the order of the Subordinate Judge, can only be reasonable if they are to be legally bound by the decree in one suit, not only as to the principal defendant, but as between themselves: and it is only in this sense that 'their presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.' But the question involved in each suit is not what are the rights of two sets of plaintiffs *inter se*; the issue to be decided between the defendant, Musammat Naraini Kuar, and each set of plaintiffs is perfectly plain and intelligible, and, as she is in possession, the burden of proof will be on those who assail her title. Necessarily all the plaintiffs are interested in the determination of the "adoption" set up by the principal defendant; but, as I have already remarked, I do not see how a finding upon this point in either suit can bind the joined defendants to the plaintiffs or the plaintiffs to the joined defendants in respect of their mutual claims between one and another to the property; or in the event of the principal defendant establishing the adoption in one case, can obviate a second trial. No plea of *res judicata* could be sustained.

Upon the argument before us Mr. Hill for the appellant called our attention to three judgments of Sir Barnes Peacock, reported in 7 W. R., p. 202; 8 W. R., p. 16; 10 W. R., p. 338, which are valuable and instructive. For though these were given upon cases arising under section 73 of Act VIII of 1859, the reasoning and principles of interpretation enunciated may appropriately be followed in construing section 32 of Act X of 1877. Under section 73 of Act VIII of 1859, the Court had power to join 'all parties who may be likely to be affected by the result,'—an expression that might be taken to mean a great deal more than was ever intended by the Legislative authorities, and which Sir Barnes Peacock, in the judgments already adverted to, was careful to qualify and reduce within intelligible limits. But now reading, as I think one should, sections 28, 29, and 32 of Act X together, the terms 'questions involved in the suit' must be taken to mean questions directly arising out of, and incident to, the original cause of action, in which, either in character of plaintiff or defendant, the person to be joined has an identity or community of interest with that party in the litigation on whose side he is to be ranged. I do not lay this down as an invariable rule by which applications under section 32 of Act X should be determined, for cases may arise similar to one reported at p. 315 of Vol. 7 W. R., and another which may be found in 3 B. L. R., p. 23; but in the multitude of instances it will be a useful test to apply in deciding whether the presence of parties is necessary to enable the 'Court effectually and completely to adjudicate and settle the questions involved in the suit.' I entirely agree with the remarks of Pontifex, J., in *Mahomed Badsha* v. *Nicol, Fleming and others* (1); and applying them to the present cases, it appears to me that the joinder of the two sets of plaintiffs as defendants was not necessary to enable the Court effectually and completely to settle the question arising between the plaintiffs and Musammat Naraini Kuar in the respective suits." The order of the 4th of July 1879 was on these grounds reversed. Both suits, accordingly

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proceeded without being consolidated, but both were transferred to the Court of the District Judge and heard together.

The District Judge having decreed (20th of June 1881) the claims of the plaintiffs in both suits for possession of their shares in the property with costs of all parties out of the estate, the defendant, Naraini Kuar, filed separate appeals in each suit. In the ppeal of *Naraini Kuar* v. *Piyare Lal and others* the parties arrived at a compromise, of which the terms were drawn up in a decree. In the appeal of *Naraini Kuar* v. *Chandi Din and others* the Court (8th of July 1885) ordered that the suit should be referred to the District Judge, under s. 566, Civil Procedure, for a finding "whether Chandi Din, plaintiff, was, according to Hindu law, as nearest heir, entitled to the property left by Naubat Ram." The District Judge found (15th of April 1886) that Chandi Din was not the heir of Chaudhri Naubat Ram, but that two persons, *viz.*, Shib Lal and Bhairon Prasad, now and at the commencement of the suit, both living, stood nearer in point of heirship to Naubat Ram than did Chandi Din. Return was made accordingly. Objections disputing the correctness of this return were disallowed, and the High Court (7th of December 1886), affirming the conclusion of the District Judge upon the issue, dismissed Chandi Din's suit. The judgment is reported at p. 469 of I. L. R., 9 All.

Mr. *J. D. Mayne*, and Mr. *G. E. A. Ross*, for the appellant. Under the circumstances the order of the 8th of July 1885, framing a new issue, was not rightly made. It enabled the defendant, Naraini Kuar, to put forward a new defence in the Court of appeal, which had not been set up in the first Court. This new defence was inconsistent with that on which she relied in the other suit, tried with this, in which she was defendant. At the trial of the new issue much of the evidence consisted of that adduced in the compromised suit. Naraini in that suit had originally pleaded that the plaintiffs, Piyare Lál, Shib Lal and others, were strangers and not of Naubat Ram's family. She was, therefore, debarred from taking the inconsistent ground that they belonged to his

family in a degree nearer than that of the plaintiff Chandi Din. Objections had been taken on behalf of the latter to the admission of evidence, which, however, had been admitted with the result that the pedigree put forward for the defence was found proved. This finding was tantamount to one that Shib Lal and Bhairon Prasad of the family of Piyare Lal, who had died during these proceedings, were seventh in descent from one Hiraman, the ancestor common to them and to Chaudhri Naubat Ram; to whom, in fact, as might have been found but for the irregular admission of evidence, Chandi Din was the nearest heir.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondent were not called upon.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

In this case their Lordships understand that no question is raised for the purposes of this appeal as to the correctness of the findings of the High Court either in law or in fact, but the objection is one preliminary to those findings, and consists of a suggestion that the High Court have committed improprieties in point of procedure by which the appellant has been prejudiced. The first impropriety alleged is the remand to the District Judge in order to try the issue whether the plaintiff Chandi Din is the nearest heir under the Hindu law to the estate left by Naubat Ram. It is contended that inasmuch as the defendant Naraini Kuar had not raised that issue in her written statement, and as the issue had not been tried by the District Judge, she was debarred from raising it. Their Lordships think that there is no ground for that contention. When the suit was first instituted against Naraini she claimed under an alleged adoption of the deceased husband by Naubat Ram, and she disputed the title of the two rival sets of alleged heirs who brought suits against her. The title of Piyare Lal and others was established against her by decree; and although that decree was not affirmed by the High Court, but was the subject of compromise between her and others, she then had a perfect right to say:—"That title which I disputed or ignored before has been established against me by a decree, and I now claim to set it up in order to defeat the

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claim made by persons who allege that they are heirs of Naubat Ram." She had a right to have that question tried, and the High Court directed it to be tried.

The next objection is that a quantity of evidence has been improperly admitted; and in order to see exactly how that stands, their Lordships will take notice of the state of the litigation.

Two suits were brought against Naraini Kuar in the year 1879, one by Chandi Din, the present appellant, who claimed to be the heir of Naubat Ram, and the other by Piyare Lal and others, who also claimed to be heirs of Naubat Ram. The District Judge attempted to consolidate those suits so as to settle the question *uno flatu* between the various litigant parties, but, no doubt for good technical reasons, that well-meant attempt was defeated, and the two suits had each to go on independently of the other. But in point of fact there were issues in those suits which were identical with one another, and they went on *pari passu*, and were tried simultaneously before the District Judge.

There was one question—a material one—which was not common to the two suits, and that was the question whether Piyare Lal and his faction, as they are called—his co-plaintiffs—were of kin to Naubat Ram. That question did not arise in Chandi Din's suit, but it was certainly a most reasonable course that the evidence taken in one suit should be admitted in the other; and the parties came to an agreement on the 12th of January 1881 that the evidence adduced in the case of Piyare Lal should be accepted also in the case of Chandi Din. There was no limit then put as to the kind of evidence that was to be adduced. The agreement extends to the whole evidence, and the whole evidence in Piyare Lal's suit was imported into that of Chandi Din. When the remand took place, a further agreement was come to between the parties on the 19th of January 1886, by which it was agreed that the evidence recorded by the Subordinate Judge in a subsequent suit that was brought by the co-plaintiffs of Piyare Lal should be admitted for the determination of the issues in the present case; and subsequently to that, *viz.*, on the 15th of February 1886, an application was made that the

original papers contained in the record of the case of *Chaudhri Shib Lal and others* v. *Chandi Din*, and those in the case of *Chaudhri Shib Lal and Piyare Lal and others* v. *Naraini Kuar*, decided on the 20th of June 1881, should be perused, and on that day an order was made that the list of documents produced in Piyare Lal's suit should be put up with the record. All that list appears to have been treated as evidence upon the trial of the issue ordered by the remand.

It is objected that the agreement of 1881 should be limited by confining it to that evidence which related to the issues common to the two suits; and it is alleged that the District Judge erred in admitting for the trial of the issue on remand the whole of the evidence which was admitted under the order of 1881. But their Lordships find that there was ample opportunity for considering the effect of the evidence admitted by the order of the 15th of February 1886. The evidence appears to have been taken into consideration on the 19th, 20th, and 22nd of February 1886. The 10th of March was fixed for the hearing, and in fact the case was heard from the 1st to the 3rd of April 1886. There seems to have been some discussion as to the admission of particular documents; it does not matter exactly what the discussion was, but it shows that the attention of the parties was called to the state of the evidence; and there does not appear to have been any objection made then to the admission of this evidence in bulk. The District Judge, in his judgment, refers to the agreement to take the evidence in the second suit of Piyare Lal's party, and then he states this:—"Of the evidence adduced on behalf of the appellant Rani Naraini Kuar, a great portion consists of that adduced by Piyare Lal and others in their former suit against her;" but he does not go on to say that any objection was taken. It is apparent that no objection was taken; but an objection was founded upon that evidence to the effect, as has been already referred to, that Naraini Kuar was by her conduct in Piyare Lal's suit estopped from raising the issue which the District Judge had to try between her and Chandi Din.

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Now it appears to their Lordships that if there was any objection to the admission of this evidence it should have been made at that time. Either there should have been an objection that the agreement of 1881 did not apply to it, and that it should be rejected *in toto* until proved independently; or some application should have been made providing that Chandi Din should be placed in as favorable a position as if the evidence had been originally adduced against him by Naraini Kuar, instead of being adduced by Piyare Lal. But nothing of the kind took place.

On appeal to the High Court some objection was made, which it is not very easy to construe, to the effect that the District Judge had misapprehended the consent as to reading the evidence on the record of the cases pending in the Subordinate Judge's Court; but even then no objection was raised that the District Judge was wrong in admitting the evidence adduced in the case of *Piyare Lal* v. *Naraini Kuar*. Therefore it is very difficult for the appellant to make anything of that written objection upon the appeal. Before the High Court it appears that certain specific objections were made to a large number of documents. In the first place an objection was made to the whole, as not coming from proper custody. But that is not an objection that they were not properly admitted, excepting on that one ground that they did not come from the proper custody.

There are a number of specific objections on other grounds, but no trace of an objection that the District Judge was wrong in admitting the evidence in bulk as given in the suit of Piyare Lal.

Their Lordships are clear that the parties really intended that the evidence should be admitted; and probably it was the most reasonable course to take. There is no reason to suppose that if any objection had been taken by Chandi Din the whole of this evidence could not have been proved against him; and the parties took a shorter and a cheaper course by admitting it in bulk, as it was given in the suit of Piyare Lal.

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In the result their Lordships will humbly advise Her Majesty that the judgment appealed against ought to stand, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant :—Messrs. *Barrow* and *Rogers*.

Solicitors for the respondent :—Messrs. *T. L. Wilson and Co.*

APPELLATE CIVIL.

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

DEOKI PRASAD AND OTHERS (PLAINTIFFS) *v.* INAIT-ULLAH (DEFENDANT) *.

Muhammadan Law—Waqf—Waqf-namah containing provision for descendants of grantor.

The fact that the grantor of a *waqf* has in the deed constituting the same made some provision for the maintenance of his kindred and descendants will not render the *waqf* invalid. *Sheik Mahomed Ahsan-ulla Chowdhry* v. *Amarchand Kundu* (1) and *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (2) referred to.

The facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *Amiruddin* for the appellants.

The Hon'ble Mr. *Spankie*, for the respondent.

EDGE, C. J.—The plaintiffs, appellants here, on the 19th of March 1885 obtained a money decree against Kudrat Ali. On the 27th of July 1885, Kudrat Ali executed a deed which is alleged to be a *waqf-namah*, and thereby transferred a portion of his property to his son Inait-ullah. The appellants here proceeded to execute their decree against the portion of the property which had been assigned by the deed of the 27th of July 1885. Inait-ullah filed objections claiming that the property was *waqf*. His objections were allowed, and thereupon the plaintiffs brought this suit against Inait-ullah and his father Kudrat Ali. The first Court decreed the suit. The lower appellate Court allowed the appeal of Inait-

*Second Appeal No. 888 of 1888 from a decree of Lala Lalta Prasad, Subordinate Judge of Ghazipur, dated the 21st March 1888, reversing a decree of Lala Bageshri Dial, Munsif of Rasra, dated the 17th November 1887.

(1) L. R. 17 I. A. 28. (1) 13 W. R. 235.