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of law do not, in our opinion, arise. Consequently we find ourselves unable to grant the leave asked for, and dismiss this application with costs.

Application dismissed.

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April 15.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

BANSI LAL AND OTHERS (PLAINTIFFS) v. RAMJI LAL AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 32—Order adding defendant—Means of questioning such order—Practice—Decree in previous suit defining rights of a party to a subsequent suit—Effect of such decree as against such party until set aside by proper procedure.

Where an order adding a defendant under section 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh* v. *Chakardhari Singh* (1) referred to.

Where there is a subsisting decree in a previous suit which as regards the subject-matter of a subsequent suit would take effect under section 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by such decree to question in the subsequent suit the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. *Karamali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal* and Pandit *Baldeo Ram Dave* for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal* for the respondents.

KNOX, ACTING C.J., and BANERJI, J.—The property claimed in the suit out of which this appeal has arisen belonged originally to one Ishk Lal. He was the son of Jai Singh, who was one of five brothers, namely, Hardayal, Sawai, Ram Nath, Chunni Lal and Jai Singh. Hardayal's son was Daulat Ram, the father of the plaintiffs appellants. The respondent Ramji Lal is the

* First Appeal No. 54 of 1894 from a decree of Pandit Bansidhar, Subordinate Judge of Meerut, dated the 18th November 1895.

(1) I. L. R., 15 All., 119. (2) I. L. R., 13 Bom., 137.

brother of Ishk Lal. It is asserted on the one hand and denied on the other that Ramji Lal was adopted by his uncle Sawai. Ishk Lal died in 1884 leaving him surviving his widow Shama Kuar, and his two daughters Jai Dai and Dhapo. His estate came into the possession of his widow Shama Kuar, and on her death in 1886 it was taken possession of by Ramji Lal, defendant, and Daulat Ram the father of the plaintiffs. In 1889 Jai Dai for herself and as the next friend of her minor sister Dhapo brought a suit against Ramji Lal and Daulat Ram for possession of the estate of Ishk Lal on the ground that they were entitled to it in preference to those persons. On the 12th of August 1889 the parties to that suit agreed to refer their dispute to arbitration, and the Court granted permission to Jai Dai to enter into the agreement of reference to arbitration on behalf of her minor sister Dhapo. On the 29th of June 1890 the arbitrators made their award, and in accordance with that award a decree was made on the 5th of July 1890, whereby a portion of the property claimed was decreed to the two daughters of Ishk Lal. It is admitted that in pursuance of that decree possession was obtained by the daughters in respect of the property decreed to them. The present suit is for a partition of the remainder of Ishk Lal's property, and was brought against Ramji Lal alone by the plaintiffs, the sons of Daulat Ram, who has died since the decree of 1890. Ramji Lal in his defence pleaded the *jus tertii* of Musammat Dhapo, and set up a preferential title to the estate of Ishk Lal. Dhapo intervened and applied to be made a defendant under section 32 of the Code of Civil Procedure. In spite of the objection of the plaintiffs her application was granted, and she was arrayed as a defendant to the suit. She urged in answer to the claim that she alone was entitled to the estate of Ishk Lal; that neither the plaintiffs nor anyone else had a right to that estate; that Jai Dai her sister had no right to that estate in preference to her; that the proceedings connected with the former suit and the reference to arbitration were fraudulent and were taken in collusion between Jai Dai and the father of the

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plaintiffs and Ramji Lal, and that the decree in that suit was not binding on her. It was asserted by the plaintiffs that the decree was binding on Dhapo and that according to the custom prevailing among Saraogis, to which sect the parties to the suit belonged, a daughter could not inherit.

The lower Court has found in favour of Dhapo and dismissed the claim. The plaintiffs have preferred this appeal.

Mr. *Moti Lal* on behalf of the appellants asked our leave to urge the plea that Dhapo had been improperly made a defendant to the suit, her interest being adverse both to the plaintiffs and to the original defendant Ramji Lal. As no appeal had been preferred under section 588 of the Code of Civil Procedure from the order adding Musammat Dhapo as a defendant to the suit, and as no plea was taken in the memorandum of appeal questioning the propriety of that order, we, following the ruling of this Court in *Tilak Raj Singh* v. *Chakardhari Singh* (1), refused to grant him the permission sought by him.

The main contention on behalf of the appellants is that the decree of 1890 is binding on Dhapo, and consequently it is no longer open to her to question the plaintiff's title as regards the property now claimed. There can be no doubt that if the decree of the 5th of July 1890 is binding on Dhapo the portion of the claim advanced on her behalf in the suit in which that decree was passed must, having regard to Explanation 3 of section 13 of the Code of Civil Procedure, be deemed to have been dismissed, and it is no longer open to her to contend that she is entitled as against the plaintiffs to the property claimed in the former suit, but not decreed to her. If, however, she is in possession of that property, she may probably resist the claim on the ground that the plaintiffs are not entitled to recover the property without proving their own right to it. It is, however, not necessary to decide that question, as it has nowhere been suggested that she is in such possession. The plaintiffs stated in their plaint that they were in possession of the property in dispute jointly with Ramji Lal,

(1) I. L. R., 15 All., 119.

and although Ramji Lal in his defence pleaded the *jus tertii* of the daughters of Ishk Lal he did not assert that they were in possession of the property claimed. Dhapo in her written statement did not allege that she was in possession. That being so, if the decree in the former suit is binding on Dhapo, she cannot resist the claim of the plaintiffs. We have therefore to determine whether the decree of 1890 is binding on Dhapo. The lower Court has held that decree and the arbitration proceedings which preceded it not to be binding, on the ground that Dhapo being the unmarried daughter of Ishk Lal was entitled to his estate in preference to his married daughter Jai Dai; that Jai Dai had consequently an interest adverse to that of Dhapo and could not act as the next friend of Dhapo, and that all the proceedings connected with the suit brought by Jai Dai on behalf of Dhapo, including the arbitration proceedings, are null and void as against Dhapo. We may observe that the ruling in *Kalavati* v. *Chedi Lal* (1) on which the learned Subordinate Judge has relied has no bearing upon the question before us.

We are of opinion that so long as the decree of 1890 subsists it cannot be treated as a nullity. If it was obtained by fraud, or if for any other reason it is a decree which is prejudicial to the interests of Dhapo, she must get the decree set aside before she can avoid the operation of it. In this case the only ground on which the validity of the decree is impeached is that Jai Dai having an interest adverse to that of Dhapo could not, having regard to the provisions of section 445 of the Code of Civil Procedure, act as the next friend of Dhapo. In the first place, we observe that she did not claim any specific share for herself; in the next place, she was the *de facto* guardian of Dhapo, no other guardian being in existence. Moreover, under section 3 of Act No. XL of 1858, which was in force when the former suit was brought, no guardian of a minor could sue on behalf of the minor without obtaining a certificate of guardianship or the leave of the Court to sue for the minor. In the present instance

(1) I. L. R., 17 All., 531.

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it must be presumed that leave was granted by the Court to Jai Dai to sue on behalf of the minor (*Parmeshwar Das* v. *Bela* (1). The further fact that the Court gave leave to Jai Dai to enter into the agreement of reference to arbitration on behalf of Dhapo also shows that the Court recognised her as a fit person to act as the next friend of Dhapo, and this notwithstanding the fact that the defendants to that suit questioned in their written statement the competency of Jai Dai to act as the next friend of Dhapo. If, as alleged in this case on behalf of Dhapo, the former proceedings were brought about by the fraud of Jai Dai, her remedy was to get the decree made in that suit set aside in the manner pointed out in *Karamali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (2). In our opinion, as the decree of 1890 has not been set aside and is still a subsisting decree, it is binding on Dhapo, and it is not open to her to set up her own title as against the plaintiffs. The Court below has in our opinion erred in holding that the plaintiffs are not entitled to maintain the suit as against Dhapo. As we have said above, had Dhapo been in possession of any portion of the property now claimed, she might have put the plaintiffs to proof of their title, although she might not set up against them a title in herself, but she has not alleged that she is in possession, nor has she established her possession.

It has not been determined what the rights of the plaintiffs are as against Ramji Lal. In fact the case as between him and the plaintiffs has not been tried at all. This must now be done.

We allow this appeal, and, setting aside the decree below, we remand the case under section 562 of the Code of Civil Procedure with directions to readmit it under its original number in the register and to try it on the merits as against Ramji Lal. The plaintiffs will get their costs of this appeal. The costs hitherto incurred in the Court below will abide the event.

Appeal decreed and cause remanded.

(1) I. L. R., 9 All., 508. (2) I. L. R., 13 Bom., 137.