

Their Lordships will therefore humbly advise Her Majesty to reverse all the judgments appealed from, and to give the appellants decree of ejectment in terms of their plaint; to order that the costs, if any, already paid by the appellants, under the decrees respectively of the Munsif of Hathras, the Subordinate Judge of Aligarh, and the High Court at Allahabad, be repaid ~~whom~~ appellants by the respondents; and that there be no costs of suit in the Courts below paid to or by either of the parties. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

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

Solicitors for the respondents, Kundan Lal and Birj Lal.—Messrs. *Barrow and Rogers.*

PARSOTAM GIR (PLAINTIFF) v. NARBADA GIR (DEFENDANT).

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

Res judicata—Civil Procedure Code, section 13—Prior decrees between the same parties in the same claim, not arriving at a final decision.

In a former suit between the same parties that were now in litigation, in which the same claim upon title was made, a decree dismissed the suit. But the judgment in the former suit stated that it was left open to the plaintiff to sue again, and that no matters affecting the rights of the parties were decided between them. *Held*, that the prior decree was not a final decision within the meaning of section 13 of the Code of Civil Procedure, and the defence of *res judicata* was not maintained.

APPEAL from a decree (4th November 1895) of the High Court reversing a decree (29th June 1893) of the Subordinate Judge of Allahabad.

This suit was filed on the 3rd January 1893 by one Nepal Gir, upon whose decease during the proceedings the present appellant was brought upon the record. The claim was against the respondent Narbada Gir, representative of Prasad Gir, deceased, for possession with mesne profits, of lands belonging to a religious institution, which lands had been in the possession

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of Prasad Gir in his lifetime. The complaint, which was based on an agreement registered on the 30th March 1868, stated the proceedings in a prior suit of 1885, disposed of by the High Court on the 8th March 1886, between the same parties.

The defendant in his written statement pleaded adjudication of the suit of the matters now in issue.

The facts of the case, as well as the proceedings in both the suits, sufficiently appear in their Lordships' judgment on this appeal.

The only questions now raised were whether or not this suit was barred, within section 13 of the Code of Civil Procedure, by the decree of the 8th March 1886, and whether or not there was any estoppel from the former proceedings.

The Subordinate Judge held that the suit was not barred by that decree. He found in favour of the plaintiff on all the issues; and decreed possession with mesne profits for three years.

On an appeal by the defendant to the High Court, the above was reversed.

On the plaintiff's appeal, Mr. A. Cohen, Q.C., and Mr. G. E. A. Ross, for the appellant, urged that there was nothing in the judgment and decree of the High Court of the 8th March 1886 to prevent the plaintiff from bringing the present suit.

Mr. J. D. Mayne and Mr. J. F. Kershaw, for the respondent, argued that the High Court was right in holding that material contentions of the appellant had been decided against him sufficiently to cause an estoppel, so that the present suit was barred.

Mr. A. Cohen, Q.C., was not heard in reply.

Their Lordships' judgment was afterwards, on the 24th March, delivered by LORD MACNAGHTEN.

This is an appeal from a decree of the High Court at Allahabad. The plaintiff, Mahant Nepal Gir, who is now represented by the appellant, sued for recovery of possession of four villages. The suit was brought in the Court of the Judge of Small Causes at Allahabad exercising the powers of a

Subordinate Judge. He gave the plaintiff a decree which has been reversed by the learned Judges of the High Court, who dismissed the suit with costs.

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The facts of the case are few and simple and not in dispute. The whole argument before this Board turned upon the meaning and effect of a judgment of the High Court in a previous litigation between Mahant Nepal Gir and Prasad Gir, the person whom the defendant Narbada Gir claims to represent.

The parties to the present suit are sannyasis or ascetics of a sect known as Baghambari from the name of their founder, who lived more than a hundred years ago. The gaddi or shrine of Baghambari, which appears to have been endowed with considerable property, was originally established in a house below the fort of Allahabad. This house was destroyed in the Mutiny and the gaddi was removed in consequence to an adjoining mauza called Baski. The manager of the gaddi at this time was Baba Bhola Gir. Bhola Gir died on the 8th of March 1868, leaving four chelas or disciples, Nepal Gir, Bijai Gir, Moti Gir and Prasad Gir. There seems to have been at first some dispute about the succession, but the differences, whatever they were, were soon arranged. On the 25th of March 1868 the four chelas executed an ikrarnama or deed of arrangement providing for the administration of the gaddi and division of offices between them. Nepal Gir became gaddi-nashin or head Mahant, Moti Gir Bhandari or treasurer and manager at Allahabad; Bijai Gir manager of certain villages, and Prasad Gir manager of the villages in dispute.

This ikrarnama was duly registered on the 30th of March 1868. It recites that Bhola Gir before his death gave the following direction to his four chelas in the presence of respectable people:—"After me you four persons should by common consent become proprietors of all the properties belonging to the gaddi of Baba Baghambari and should maintain the property and management thereof as usual like myself." It then goes on to declare that in compliance with that direction

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and in order to avoid future disputes and to keep up the name and prestige of the gaddi and properties the four persons parties to the deed unanimously covenanted in the terms expressed in the following clauses. Clause 1 provided that Nepal Gir having been appointed Mahant should be installed as gaddi-nashin. Clause 2 so far as material was in the following words:—

“2ndly, that as formerly the name of Baba Bhola Gir was entered in respect of the ilakas (villages) and the Mahant's name was not entered, so the names of Bijai Gir and Prasad Gir be entered in respect of the ilakas and they should be peshwakars (heads) and managers of the property (ilakas) and other affairs and should maintain the management of receipts and disbursements in the same way as it had been before. But they on account of their names being entered or any other person for any reason neither have nor shall have any right whatever nor even the Mahant himself shall have any power of partition or temporary or permanent transfer in respect of the whole or any part of the movable or immovable property because all the properties belong to the gaddi of Baba Baghambari and they are not meant for person or for any particular individual.”

Clause 1 had provided for the expulsion of the gaddi-nashin in certain events. Clause 2 provided for the expulsion of any of the other three “discovered doing any vicious act or any act disgracing the gaddi or contrary to the customs of the Math.” Clause 3 provided that—

“As at present the disciples stay at ilakas (villages) and look after the management of cultivation and making collections of the ilakas like managers, so Bijai Gir and Prasad Gir should in the like manner live there as munsharims and managers and carry on the current affairs as usual. In case of their proving unfaithful and of misconduct the Mahant Moti Gir and the third person who might be left of good behaviour have and shall have power to turn them out with their mutual consent and consultation as an owner has in respect of the manager.”

Clause 4 provided for the duties to be undertaken by Moti Gir. Clause 5 so far as material was as follows:—

“5thly, that none of us either gaddi-nashin, peshwakar or another disciple or anyone who may be the successive representative or disciple of any person shall have any power to act contrary to any of the terms of this document and those who are our disciples should also live as usual in those ilakas of which we are the managers in our stead; but in case of misbehaviour the Mahant and Peshwakar have and shall have in every case authority to turn them out.”

On the terms of this ikrarnama Prasad Gir entered into possession of the villages in dispute. One of his first acts after he obtained possession was to join with the other three persons parties to the deed in a petition for a certificate to enable the four to collect the debts due to the estate of Bhola Gir. The petition was verified by a declaration signed by Prasad Gir himself. It set out Bhola Gir's will as contained in the ikrarnama and proceeded to state that the petitioners in union among themselves for giving additional strength to the will having executed an ikrarnama on the 25th March 1868 "with the conditions entered therein", got it registered and according to the same mutation of names in their favour was effected, and that under the same they had been in possession and enjoyment as proprietors of all goods and properties (imlak) appertaining to the gaddi of Baghambari left by the deceased goshain.

Whether in the interval between the execution of the ikrarnama and the end of the year 1881 Prasad Gir remitted any contribution in money or in kind from the estates under his management to the gaddi of Baghambari at Baski is a question about which a good deal of evidence was adduced which left the matter still in doubt. For the purpose of the present suit that question seems to be wholly immaterial. It is clear that from the commencement of the year 1882, Prasad Gir made no remittance to the gaddi of Baghambari. In June 1884 there was a meeting of the persons interested, to which Prasad Gir, Moti Gir and the representatives of Bijai Gir, who was then dead, were summoned. Moti Gir and the representatives of Bijai Gir attended and formally acknowledged the obligation incumbent upon them to act in conformity with the terms of the ikrarnama. Prasad Gir absented himself without making any excuse or sending any explanation of his conduct. The parties present resolved that Prasad Gir should be requested to state his intentions and furnish an account of the property under his management within a limited time and that then a further meeting should be convened to consider future proceedings. A notice to that effect with a copy of the

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proceedings of the meeting of June 1884 was accordingly sent to Prasad Gir. Prasad Gir, however, paid no attention to the summons, and treated the matter with absolute indifference. Thereupon the Mahant Nepal Gir, Moti Gir and the representatives of Bijai Gir brought a suit to recover possession of the villages in dispute and for an account.

Prasad Gir filed a written statement. He alleged that the villages in dispute did not belong to the gaddi of Baba Baghambari at Baski, but to the gaddi of Baba Baghambafi at Niria, one of the villages in dispute where Prasad Gir lived. He denied that he had executed the ikrarnama of March 1868. He pleaded that he had been in adverse possession for twelve years and that the plaintiffs' claim was barred by limitation.

While the suit was pending, and after it had been partly heard, Prasad Gir died. On his death Narbada Gir who had taken possession of the villages in dispute claiming under Prasad Gir was brought upon the record, but no amendment was made, nor was any fresh issue directed. The Subordinate Judge found that the villages in dispute belonged to the gaddi of Baba Baghambari at Baski, that the ikrarnama of March 1868 was executed by Prasad Gir and that he never challenged its genuineness or validity until he filed his written statement. He negatived the plea of adverse possession. He held that if Prasad Gir had been alive the plaintiffs would have been entitled under the terms of the ikrarnama to oust him from the villages in dispute on account of his misconduct in not rendering account and sending profits to the gaddi and in claiming them as his own property. He further held that Narbada, assuming that he was Prasad Gir's heir, could not retain possession of the villages in dispute against the will of the plaintiffs who were entitled to resume possession of the villages and to make a fresh arrangement for their management. He dismissed the claim for an account. Narbada, he said, had not misappropriated the profits which the plaintiffs claimed, and as it was not proved that any personal estate of Prasad Gir had come to his hands he could

not be made^f accountable for the profits received by Prasad Gir. In the result therefore the claim for an account was dismissed, but the claim for possession was granted.

Against this decree Narbada appealed. On the 8th of March 1886 the learned Judges who heard the appeal pronounced a judgment which unfortunately neither the High Court on the appeal in the present suit nor the learned counsel at the bar nor their Lordships are able to understand. They seem to have misapprehended the grounds of the Subordinate Judge's decision. They held Prasad Gir absolved apparently because it was not proved to their satisfaction that he "had acted as a person accountable to the gaddi." "The impression left upon our minds," they said, "is that . . . there is good reason for believing that from 1868 down to his death Prasad Gir occupied and asserted an independent position in respect of the Niria Shrine." So they held that the suit would have failed against Prasad Gir if he had been alive, and accordingly they reversed the decree and dismissed the suit against Narbada Gir as the legal representative of Prasad Gir with costs. But they concluded their judgment with the following announcement—
 "We think that the Subordinate Judge should, as we propose to do, have left it open to the plaintiffs, or rather Nepal Gir, to institute a suit against Narbada Gir personally in which a number of questions which as yet have never been raised or considered can be properly dealt with and determined, and in holding that the present suit failed as against Prasad Gir, we leave untouched and undecided all matters affecting the rights of the plaintiff Nepal Gir on the one side and of Narbada Gir on the other."

On the 30th of July 1892 Nepal Gir sent a notice to Narbada Gir, requesting him under threat of legal proceeding to come in and submit his accounts, treating him as "manager and agent in charge" of property belonging to the gaddi of Baghambari. As Narbada Gir paid no attention to this notice the present suit was brought for the purpose

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of recovering possession of the villages in dispute. Narbada pleaded the defence of *res judicata*, adverse possession by Prasad Gir and title under Prasad Gir's will, and refused to admit the validity and existence of the ikrarnama of March 1868.

The Subordinate Judge held that the suit was not barred by the decree of the High Court of the 8th of March, 1886. He found in favour of the plaintiff on all the issues and gave a decree for possession with mesne profit for three years.

Narbada Gir appealed to the High Court. On the 14th November 1895 the learned Judges of the High Court pronounced a judgment which is almost, if not quite, as difficult to understand as the judgment of their predecessors in 1886. They observe that the difficulty which they had felt in the case had been "in trying to ascertain from the judgment of the Court in the previous suit what were the findings upon which this Court in that suit made its decree dismissing the suit." They then address themselves to the solution of that problem. They begin by rejecting the only part of the former judgment which is absolutely clear, and they express their opinion that "the only possible construction of that judgment which would make it consistent throughout and would not suggest absolutely inconsistent findings" is a construction which (if their Lordships have rightly apprehended its effect) leaves it undetermined whether the ikrarnama of 1868 was or was not proved or was or was not binding on the parties and attributes to learned Judges of one of the highest Courts of Appeal in India the view that a person who executes a solemn instrument in the terms of such an ikrarnama and accepts the management of property on the conditions therein contained is at liberty to repudiate the trust and to set up an adverse title in some other religious foundation if not in himself without being liable to removal either by the parties interested or by the Court. Having placed this construction on the earlier judgment and finding that the only charge against Narbada Gir was that he obtained possession under the ikrarnama of 1868, and then wholly repudiated the obligations of that instrument the

learned Judges of the High Court treated *Courts.*

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The High Court placed some reliance on it or act the 30th of July 1892. Narbada Gir did not accept on the upon it. It seems to their Lordships to have no bearing question between the parties.

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Their Lordships think that it would be an idle and a hopeless task to speculate upon the grounds of the judgment of the High Court in 1886. Whatever the grounds may have been, they are certainly not apparent on the face of the judgment. One thing, however, is plain; the learned Judges in 1886 did not intend to decide anything as between Nepal Gir and Narbada Gir. They "left it open to Nepal Gir to institute a suit against Narbada Gir personally." They said in so many words: "We leave untouched and undecided all matters affecting the rights of the plaintiff Nepal Gir on the one side and Narbada Gir on the other." The only reason why the High Court in 1895 refused to give effect to those words was because they considered that if they construed them according to their plain meaning they "should be holding that the decree of this Court in the previous suit was simply what is known in England as a decree of non-suit." Such a decree, they say, no Court in India has power to make. Now the objection to a judgment of non-suit under the old practice in this country—there was no such thing as "a decree of non-suit" for the term "non-suit" was not known in Chancery—was this:—It enabled a plaintiff after he had dragged the defendant into Court, if he found the case going against him or that he had not the requisite materials to support his claim, to elect to be non-suited, with the result that he could bring a fresh action and so harass the defendant with further litigation. The Judge at the trial was powerless: the plaintiff was *dominus litis*. There can be no room for such an objection when the Judge has the matter in his own hands. But however that may be, the real answer to the difficulty propounded by the High Court is this:—The question is not whether the judgment of the High Court in 1886 was

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question as between id or did not finally decide the present contradiction in Nepal Gir and Narbada Gir. It would be a matters which terms to say that the Court had finally decided. Mr. it expressly left "untouched and undecided."

the Mayne for the respondent did not go so far as to contend at the judgment of 1886 as it stands, and of itself would support a plea of *res judicata*. Following the arguments or suggestions contained in the judgment under appeal, he endeavoured to persuade their Lordships that there must have been some grounds for the decision of the High Court in 1886 or some findings underlying that decision which would support a case of what may be called constructive estoppel. It is enough to say that there is no such thing known to the law as constructive estoppel and if there were it would not satisfy the requirements of section 13 of the Code of Civil Procedure (XIV of 1882). "The conditions for the exclusion of jurisdiction on the ground of *res judicata* are" as Willes, J., says, "that the same identical matters shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted and that it shall have been finally decided" (1). That is just what section 13 requires; there must be a final decision.

Their Lordships are of opinion that the view taken by the Subordinate Judge was correct. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, the decree of the High Court reversed, and the appeal to it dismissed with costs, and the judgment of the Subordinate Judge restored.

The respondent must pay the costs of the appeal.

Appeal allowed.

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

Solicitors for the respondents—Messrs. *Barrow and Rogers.*

(1) *Langmead v. Maple* (1865) 18 C. B. N. S. 255; at p. 270.