1902
February 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BANSI LAL AND OTHERS (DEFENDANTS) *v.* DHAPO (PLAINTIFF).*

Act No. 1 of 1872 (Indian Evidence Act), section 44—Res judicata—Evidence—Competence of party against whom a former judgment is set up as constituting res judicata to show that such judgment was obtained by fraud or collusion—Custom—Saraogis—Alleged custom of exclusion of daughters from inheritance to their fathers set up, but not proved.

When a subsisting judgment, order or decree, which is relevant under sections 40, 41 or 42 of the Indian Evidence Act, 1872, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside, but it is open to such party, in the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Nistarini Dassi* v. *Nundo Lall Bose* (1), *Rajib Panda* v. *Lakhan Sendh Mahapatra* (2) and *Bansi Lal* v. *Ramji Lal* (3) referred to.

Semble that no custom exists in the North-Western Provinces of India amongst the members of the Saraogi community by reason of which females are excluded from inheriting the property of their fathers.

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

Pandit *Moti Lal Nehru* (for whom Babu *Durga Charan Banerji*) and Pandit *Baldeo Ram Dave*, for the appellants.

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

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Meerut, passed in favour of the plaintiff in a suit brought for recovery of certain zamindari property, and also of a sum of money. The facts briefly stated are as follows:—The property in dispute belonged to one Ishk Lal, the father of the plaintiff, Musammat Dhapo. Ishk Lal died in the year 1884, leaving a widow, Musammat Shama, surviving him, and also two daughters—one a married daughter Jai Dei, and the other the plaintiff, who was unmarried. Musammat Shama died on the 13th of March, 1886, and after her death

*First Appeal No. 303 of 1898 from a decree of Maulvi Muhammad Ismail, Subordinate Judge of Meerut, dated the 11th October 1898.

(1) (1899) I. L. R., 26 Calc., 891. (2) (1899) I. L. R., 27 Calc., 11.
(3) (1898) I. L. R., 20 All., 370.

the defendant, Ramji Lal, who was a brother of Ishk Lal, and Daulat Ram, who was a first cousin of Ramji Lal and father of the defendants Bansi Lal, Shitab Rai, Mul Chand, Tota Ram and Pirbhu Lal, took possession of the property in dispute. Shortly afterwards, in the year 1889, Jai Dei instituted a suit on behalf of herself and the plaintiff against Ramji Lal and Daulat Ram for recovery of the property. Jai Dei, who acted in the suit as next friend of the plaintiff, Musammat Dhapo, was herself a minor of the age of 15 years, and the plaintiff was younger than she. The subject-matter of the suit was referred to arbitration on the 12th of August, 1889, and on the 20th of June, 1890, an award was made which was confirmed by a decree of the 5th of July 1890. By the award the property of Ishk Lal, which was of the value of about Rs. 50,000, was divided between the litigant parties, two sums of Rs. 2,000 each being awarded to the plaintiff, a sum of Rs. 7,500 to Jai Dei, and the balance to Ramji Lal and Daulat Ram. Subsequently Daulat Ram died, and his sons, defendants in this suit, instituted a suit, No. 265 of 1894, against Ramji Lal for partition of the property of Ishk Lal which had been awarded to Daulat Ram by the arbitrators. The plaintiff, Musammat Dhapo, intervened in this suit under section 32 of the Code of Civil Procedure, and contended that neither the plaintiffs nor anybody else had any title to any portion of the estate of Ishk Lal; that she, having been the only unmarried daughter of Ishk Lal at the time of his death, was entitled to the whole of his estate; that the proceedings taken by Jai Dei in the former suit were taken in collusion with Daulat Ram and Ramji Lal and were fraudulent. Whether or not the plaintiff was entitled to intervene in that suit under section 32 of the Code of Civil Procedure is a question which it is unnecessary for us now to determine. The Subordinate Judge entertained her objection and dismissed the suit on the 18th of November, 1895. On appeal the High Court set aside the decree on the ground that the decree of the 5th of July, 1890, could not be treated as a nullity, as it was treated by the Subordinate Judge, unless it was first set aside by a Court of competent jurisdiction. During the pendency of that appeal to the High Court, namely, on the 29th of May, 1896, Musammat Dhapo instituted the present suit against Musammat

1902

BANSI LAL v. DHAPO.

Jai Dei, Ramji Lal and the sons of Daulat Ram, who was then dead, for possession of the property of Ishk Lal which had been acquired by them under the award, alleging that the arbitration proceedings and the decree passed thereon were illegal and void as against her. On the 5th of May, 1898, she applied for liberty to amend her plaint by adding a prayer to have the award and the decree thereon set aside, and leave to do so was granted on the 20th of May, 1898, and the plaint was amended. The defence of the defendants is, first, that the claim is barredby the statute of limitation; secondly, a traverse of the alleged fraud; and, thirdly, that amongst Saraogis, the sect to which the parties belonged, daughters are excluded from inheriting their father's property. The plaintiff only attained majority on the 8th of December, 1893, and it is admitted that the suit was in time at the date of the presentation of the plaint. But the defendants' case is that, so far as the plaintiff sought in her plaint to have the award and decree set aside, her claim is statute barred, inasmuch as it was not raised until the 20th of May 1898. The Subordinate Judge decided the several issues in favour of the plaintiff, and hence the present appeal.

In the first place, it is contended on behalf of the defendants that the amendment of the plaint changed the character of the suit and ought not to have been allowed. Let us see if this is so. In her plaint as it originally stood the plaintiff alleged in the 5th paragraph that Jai Dei, Daulat Ram, and Ramji Lal filed a collusive arbitration agreement on the 12th of August 1889, and that Jai Dei agreed to the arbitration on her behalf. In the 11th paragraph she avers that the arbitration proceedings, the award and the decree thereon are all illegal, ineffectual and null and void against the plaintiff, as was held by the Subordinate Judge in the suit to which we have referred; but that in spite of this the defendants continue in possession of the property in suit without any right; and in the 12th paragraph she alleges that the possession of the property in dispute by the defendants was the result of joint collusive proceedings taken by them during the minority of the plaintiffs in order to deprive her of her right. Then in the prayer she asked, amongst other things, for possession of the property, and also for any other relief to which she

may be justly entitled in the opinion of the Court. From this it appears that in the plaint as it originally stood, allegations of fraud and collusion on the part of the defendants were made in the most clear and distinct terms. Subsequently, however, as we have said, to the institution of this suit the decree of the High Court was passed in suit No. 265 of 1894, in which the learned Judges held that the decree of the 5th of July, 1890, could not be treated as a nullity, and accordingly the plaintiff, it may be, *ex abundanti cautela* applied for and obtained liberty to amend the plaint, and inserted an express prayer that the arbitration award, dated the 20th of June, 1890, and the decree, dated the 5th of July 1890, passed thereon, might be set aside; and also in the body of the plaint in the 4th and 6th paragraphs statements to the effect that the suit instituted by Jai Dei on her own behalf and on behalf of the plaintiff was a fraudulent proceeding, and that the award and decree were fraudulent and should be set aside. It appears to us that the amendments made in the plaint in no way altered the character of the suit. The substantial relief sought by the plaintiff was the recovery of the property of her father Ishk Lal, and the facts set out in the plaint, if proved, coupled with the prayer for general relief, were quite sufficient to justify the Court in treating the award and decree as nullities, and giving the plaintiff the relief which she sought, notwithstanding that this relief was not asked for in express terms. The relief sought in respect of the award and decree was subservient or ancillary to the substantial relief prayed for, and it could not be said that a new case was sprung upon the defendants or that they were taken by surprise. It was, as we have said, held by a Bench of this Court in the suit in which the plaintiff intervened under section 32 of the Code of Civil Procedure that as the decree of the 5th of July, 1890, had not been set aside and was still a subsisting decree, she must have it set aside before she could have avoided the operation of it—*Bansi Lal* v. *Ramji Lal*, (1). In that case the provisions of section 44 of the Indian Evidence Act were not brought to the notice of the learned Judges who decided it, as we have learnt on inquiry from one of them. We do not find in the report of it any reference to this section. Section 44

(1) (1898) I. L. R., 20 All., 370.

1902

BANSI LAL v. DHAPO.

runs as follows:—"Any party to a suit or other proceeding may show that any judgment, or order, or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. In the present case we find the decree of the 5th of July, 1890, which was relevant under section 40, set up and proved by the defendants, the parties adverse to the plaintiff, as an answer to the plaintiff's claim, and according to the clear and explicit language of section 44, the plaintiff is entitled to show that the decree so relied upon was obtained by fraud or collusion. We are bound to consider the section according to the plain meaning of the language used, unless we can find in it or in any other part of the Act, anything that will either modify or qualify the language. This we have not been able to find, nor has our attention been called to any words in the section or in any other part of the Act, which modify or qualify the plain meaning of the language used. The authorities upon the question as to the powers of a Court to treat decrees which had been obtained by fraud as nullities are reviewed at some length in the judgment of a member of this Bench, which was delivered by him while sitting as Judge on the original side of the High Court at Calcutta in the case of *Nistarini Dassi* v. *Nundo Lall Bose* (1). In the later case of *Rajib Panda* v. *Lakhan Sendh Mahapatra* (2) the true meaning and effect of section 44 of the Evidence Act were also considered. In that case the plaintiff, in a suit to recover possession of a tank as well as damages, adduced in evidence a petition of compromise and a decree obtained upon it in a previous suit between the same parties relating to the same tank, and the defendant stated that the decree was obtained by fraud, and therefore was not binding upon him. The Court of first instance held that the plea of fraud was not proved, but on appeal by the defendant to the District Judge the decree of the Court of first instance was set aside without coming to any definite finding on the question of fraud. Against this decision the plaintiff appealed to the High Court, when Stevens, J., reversed the decree of the District Judge, and restored that of the Munsif, on the ground that the

(1) (1899) I. L. R., 26 Calc., 891. (2) (1899) I. L. R., 27 Calc., 11.

case was concluded by the decree in the previous suit, and so long as that decree was not set aside, either by proceedings duly taken in that suit, or by separate suit brought for the purpose, it was not open to the defendant to challenge it in any subsequent suit in which it was used as evidence against him. Against this decision the defendant preferred an appeal under Clause XV of the Letters Patent, and it was held by Maclean, C.J. and Banerji, J., that under section 44 of the Indian Evidence Act, the defendant was entitled to show that the decree was obtained by fraud, and the case was accordingly remanded. The section of the Indian Evidence Act relied upon, in our opinion, amply justify this decision, and we see no reason to dissent from it. Irrespective, therefore, of the amendments in the plaint by which the plaintiff sought in express terms that the award and decree might be set aside, we are of opinion that on her suit as originally framed she was entitled to ask the Court to treat the award and decree as nullities, in the event of her establishing by evidence that they were procured by fraud or collusion. On this ground, therefore, the appeal fails.

It has been further contended on the part of the appellants that the claim to have the award and decree set aside is barred by limitation, inasmuch as the amendments were made after the claim to set aside the deed was time-barred. As we hold that the plaintiff was entitled to obtain from the Court the relief which she sought upon her claim as it originally stood, it becomes unnecessary to determine this point. But we may say that, unless the amendments were improperly allowed or ought not to have been allowed by reasons of their converting the original suit into a suit of another and inconsistent character, there is no substance in the argument. For these reasons we hold that the statute of limitation furnishes no answer to the plaintiff's suit.

The appellants next contended that the plaintiff has no title to the property in suit, inasmuch as according to the custom established amongst Saraogis females are excluded from inheriting. The evidence given upon this subject is conflicting. A number of witnesses were examined in support of the custom, but their evidence is very vague and unsatisfactory. In several cases given as illustrations of the existence of the custom uncles succeeded to

1902

BANSI LAL v. DHAPO.

the exclusion of daughters; but whether or not this was due to the existence of the alleged custom depended on the fact whether or not the property was the exclusive property of the daughters' fathers, and not the joint property of their fathers and uncles. The witnesses no doubt in each case depose in a cut and dry statement that the fathers were separate from their brothers, but what their means of knowledge of this fact was is not shown. They are mere bald statements. In several instances it is clear that the daughters did not acquiesce in the existence of the alleged custom, for the question was referred to and decided by panchayats. No wajib-ul-arz was adduced in evidence in which any such custom was recorded. The evidence of one of the witnesses for the appellants, Kishen Sahai, goes to show that there was no uniform or established or recognised custom. He says that he believed that daughters inherit their fathers' estate, and that he enquired from members of the brotherhood whether this was so or not, and that some of them said that the daughters did inherit and some that they did not. In the absence of evidence to rebut the evidence of the defendants' witnesses, it would be difficult, upon the evidence which was adduced by the defendants, to hold that the alleged custom was proved; but when we consider the evidence of the witnesses who have been examined on behalf of the plaintiff, it becomes clear beyond any doubt that no such custom existed. A number of respectable witnesses were examined on behalf of the respondent, who deposed to a number of instances in which daughters succeeded to their father's property to the exclusion of uncles and cousins. One case was particularly noticeable; it was a case of one Bahal Singh, who died worth property of the value of more than one and a half lakhs of rupees consisting of three or four villages, some 50 shops and 25 houses. Bahal Singh's own brother was alive at the time of his death, and yet his (Bahal Singh's) daughter inherited the property. If there had been any such custom as is alleged by the respondents, it is most unlikely that Bahal Singh's brother would have allowed the daughter to take and hold this property. The weight of evidence is entirely on the side of the respondent. We agree, therefore, with the learned Subordinate Judge that the defendants have wholly failed to establish the alleged custom.

We now come to the last and most important issue raised in the case, namely, whether or not the arbitration proceedings and the award and decree thereon were tainted with fraud. It is clear that Musammat Jai Dei was not a fit and proper person to act as next friend of her sister in the suit which she instituted. In the first place, her interest and that of the plaintiff were seriously conflicting, inasmuch as in no event had Jai Dei, who was a married daughter, any interest in her father's property, and yet in the suit she claimed to have a right to a share. This fact was evidently not brought to the notice of the Court when permission was given to her to act as a next friend of the plaintiff. In the next place, Jai Dei was at the date of the institution of the suit herself a minor, she being only 15 years of age, and therefore incapable of protecting the plaintiff's interests. This fact was also suppressed from the Court. Again, no relative of the plaintiff was appointed an arbitrator to look after her interest. All the arbitrators appear to have been relatives of, or connected with, the other parties to the proceedings. Then there is the further fact that out of the estate of her father, which was of the value of at least Rs. 50,000, the trifling sum of Rs. 1,000 only was awarded by the arbitrators to the plaintiff, while Jai Dei, who was not entitled to any share in it, got Rs. 7,500, and the balance was given to Daulat Ram and Ramji Lal. These matters alone would be sufficient, in our opinion, to establish the plaintiff's allegations of fraud and collusion. It is clear from them that the plaintiffs' interests were sacrificed by the parties who promoted and carried out the arbitration proceedings, and obtained a decree upon the award. *Res ipsa loquitur*. That this was so, is placed beyond all doubt by the evidence of some of the witnesses who were examined. Kishen Sahai, a witness for the defendants, who is the elder brother of the husband of Jai Dei and acted as attorney for Musammat Jai Dei in the arbitration proceedings, in the course of his evidence stated that he had spent about two and a half or three thousand rupees in proceedings taken on behalf of Jai Dei. He admitted that he believed that daughters inherited their fathers' estate, but that the defendants, Daulat Ram and Ramji Lal, told him that he "should refer the case to arbitration in respect of the questions between

1902

BANSI LAL v. DHAPO.

the parties, otherwise he would have to fight the case up to the High Court and would be ruined." It is apparent from this that Kishen Sahai had a personal interest in the success of Jai Dei's claim. Another witness, Din Dayal, who is a son of the defendant Ramji Lal, deposed that the last witness, Kishen Sahai, told him that the matter should be referred to arbitration; that if the defendants, *i.e.* Ramji Lal and Daulat Ram, would not refer the matter to arbitration, they as well as his principal, that is, Jai Dei, would be deprived of the property, inasmuch as the entire property would go to the plaintiff, Musammat Dhapo; that afterwards they consulted pleaders on the subject, and learnt from them that these parties would get no share, and that Musammat Dhapo's right would be maintained. He further said that the arbitrators did not decide the question as to whether or not the plaintiff was entitled to the property, inasmuch as they had asked them to award something to such persons. This evidence, if true, and we see no reason for disbelieving it, shows beyond any doubt the fraudulent nature of the arbitration proceedings. Another witness, Kabul Singh, who appears to have been an acquaintance and friend of Ramji Lal and Daulat Ram, deposed to a conversation which he had with Kishen Sahai in the course of which Kishen Sahai stated that he had brought a suit in respect of Jai Dei's right, but that Ramji Lal and Daulat Ram had set up a defence that the plaintiff was entitled to inherit all the property, and further, that it would be better to refer the matter to arbitration, so that the property might be divided amongst all; but Daulat Ram and Ramji Lal said that they had also consulted their legal adviser, and that he also advised them that it would be better if the matter was referred to arbitration. Another witness, Medh Singh, a kinsman of Ramji Lal and Daulat Ram, deposed to the same effect as the last witnesses. He stated, in substance, that Kishen Sahai told him that the plaintiff had the right to all the property, and that he told Ramji Lal and Daulat Ram so, and asked them to refer the matter to arbitration; that subsequently, in the presence of Kabul Singh, Nihal, Daulat Ram and Ramji Lal, Kishen Sahai was informed that the pleaders had expressed their opinion "that the plaintiff would get her right, that none of them would get even

1902

BANSI LAL v. DHAPO.

a share in it, and that therefore there should be appointed arbitrators who would divide the estate amongst all the persons." We have no reason to doubt the credibility of this evidence. It is consistent with the other facts which have been established by the plaintiff in connection with the arbitration proceedings, and we believe it to be true. It places beyond doubt the truth of the plaintiff's allegation that the award and the decree thereon were obtained by fraud and collusion. It appears to us that not merely was a gross fraud committed upon the plaintiff, but that a fraud was also practised upon the Court in suppressing the true state of facts when permission was given to Jai Dei, herself then a minor, to act as next friend of the plaintiff. We, for these reasons, entirely concur in the view expressed by the learned Subordinate Judge and have no hesitation in dismissing this appeal. Accordingly we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1901

February 5.

SAIYID ALI KHAN AND OTHERS (DEFENDANTS) *v.* DEBI PRASAD (PLAINTIFF).*

Act No. IX of 1872 *(Indian Contract Act), section* 176—*Pawnor and pawnee—Suit to recover balance of debt after sale of articles pawned—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), schedule II, article* 57.

Held, that the limitation applicable to a suit brought by a pawnee to recover the balance of his debt after accounting for the proceeds of the sale of the articles pledged is that prescribed by Article 57 of the second schedule to the Indian Limitation Act, 1877, namely, three years, and the *terminus a quo* the date of the loan. *Madan Mohan Lal* v. *Kanhai Lal* (1) and *Ram Chandra* v. *Antaji* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* and Maulvi *Ghulam Mujtaba*, for the appellants.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondent.

---

* First Appeal No. 90 of 1899 from a decree of Munshi Sheo Sahai, Officiating Subordinate Judge of Cawnpore, dated the 23rd March 1899.

(1) (1895) I. L. R., 17 All., 284. (2) Bom., P. J. 1886, p. 161