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cited. This view was adhered to in the recent case of *Kunji Lal* v. *Durga Prasad* (1). In the case last mentioned it was further held that a refusal of a court to file an award will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. The same view was held in the case of *Mustafa Khan* v. *Musammat Phuljha Bibi* (2), which has not yet been reported. Having regard to these rulings the view taken by the court below cannot be supported. There is no doubt as to the question of the plaintiff's title to the property claimed on the strength of the supplementary award. The result is that we allow the appeal, set aside the decree of the court below and decree the plaintiff's claim with costs in both courts.

Appeal allowed.

FULL BENCH.

1911
February, 28.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Karamat Husain.

JAIMANGAL DEO AND OTHERS (DEFENDANTS) *v.* BED SARAN KUNWARI (PLAINTIFF).*

Civil Procedure Code (1908), *section* 11, *explanation VI*—Res judicata—"*Right claimed in common*"—Jus tertii.

In a suit for ejectment in a Revenue Court the defendants denied the title of the plaintiff, and set up their own title as to part of the property and a *jus tertii* as to the rest. The Revenue Court elected to try the question of title itself, and found that the plaintiff had not established her proprietorship, and that decision became final.

Held, in a subsequent suit in the Civil Court for a declaration of title, that the decision of the Revenue Court, although it constituted a *res judicata* as between the plaintiff and the then defendants, could not amount to a *res judicata* as between the plaintiff and the third parties whose rights those defendants had set up.

THE facts of this case were as follows:—The plaintiff, on the 26th of September, 1906, sued the defendants, Bhagat Deo and Rabinath, father of Kinkin Deo, and Harbans Deo, in the court of an Assistant Collector of the first class for ejectment. The Assistant Collector held that the plaintiff was not the

* First Appeal No. 42 of 1910 from an order of Muhammad Ali, District Judge of Mirzapur, dated the 26th of February, 1910.

(1) (1910) I. L. R., 32 All., 484. (2) F. A. 209 of 1909, decided on the 19th January, 1911.

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proprietres of the village and dismissed the suit on the 8th of March, 1906. That decision became final. The plaintiff then brought the suit out of which this appeal arose in the court of the Subordinate Judge of Mirzapur, for a declaration that she was the owner of the village Jamvanwan. She, in addition to Bhagat Deo and the sons of Rabinath, made six others defendants. One of the pleas raised by all the defendants was that the suit was barred by *res judicata*. The court of first instance found that this was so and dismissed the suit. The plaintiff appealed against all the defendants, and the learned District Judge, holding that it was not barred against defendants Nos. 1, 2, 3, 4, 8 and 9, who were not parties to the suit of 1905, remanded the case under order XLI, rule 23. From the order of remand two appeals were preferred; one by the plaintiff (No. 67 of 1910), in which the contention was that the doctrine of *res judicata* was no bar to the suit against Bhagat Deo and the sons of Rabinath, and the other (No. 42 of 1910) by other defendants, in which the contention was that the doctrine of *res judicata* barred the suit against them also.

Both appeals were heard by a Bench of three Judges. In F. A. f. O. No. 67 of 1910, this Bench, on the 7th of February, 1910, held that the suit against Bhagat Deo and the sons of Rabinath, was barred by the doctrine of *res judicata*.

Appeal No. 42 was then heard.

Dr. *Tej Bahadur Sapru*, for the appellants submitted that the plaintiff had no *locus standi*. The effect of the judgement in F. A. f. O. No. 67 of 1910 (1) is that the plaintiff has no title to the land and that some third persons are the proprietors. Explanation VI of section 11, Civil Procedure Code, governs the case. In the written statement the defendants in the Revenue Court said that the title was vested in themselves and in their brethren *(biradaran)*. Caspersz on Estoppel, page 196 was referred to. The defendants in the former suit were claiming a title in common with the appellants. What they said was that the plaintiffs were not zamindars and they and some others were the real owners; *Chandu* v. *Kunhamed* (2)

(1) Cf. p. 453 *Supra*.

(2) (1901) I. L. R., 14 Mad., 324.

and *Somasundara Mudali* v. *Kulandaivelu Pillai* (1). There is nothing in the words of Explanation VI which prevents a defendant from setting up a claim in common with others.

Munshi *Haribans Sahai*, for the respondents :—

Explanation VI refers only to representative suits; *Sadagopa Chariar* v. *Krishnamoorthy Rao*, (2). In the present case, defendants appellants themselves in their written statement deny that Rabinath and Bhagat Deo had any right to execute a *kabuliat* on their behalf. The judgement of the Revenue Court is not a judgement *in rem* and cannot operate as *res judicata* in the present suit.

BANERJI, J.—The facts of this case are set forth in our judgement in the connected appeal from order No. 67 of 1910, in which we held, in concurrence with the court below, that the question of the title of the plaintiff respondent was *res judicata*. In consequence of our decision in that case the learned advocate for the appellants contends that we must be taken to have held that the plaintiff has no title to the property in suit and that, therefore, she is not entitled to maintain her claim against any of the defendants. I do not agree with this contention. We have not, in deciding the connected appeal, held that the plaintiff has no title. All that we have held is that the question of her title being *res judicata* against those defendants who were respondents to that appeal, the issue as to her title could not be tried as against those defendants. As the appellants were no parties to the suit in which the previous judgement was passed that judgement cannot operate as *res judicata* as between them and the plaintiff. This is conceded, but it is said that the title of the plaintiff being a part of her cause of action, she cannot set it up against the appellants, because it must be held that she has no title to the property in suit. As to this I may first observe that if she has no title as against some of the defendants, it does not follow that she has none against the other defendants also. In the next place, as I have pointed out above, it has not been decided in the suit that the plaintiff has no title. What has been decided is that in consequence of the decision in the former suit

(1) (1904) I. L. R., 28 Mad., 457 (464). (2) (1907) I. L. R., 30 Mad., 185, (190).

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she is precluded from setting up her title against those defendants who were defendants to that suit and that the issue as to her title cannot be determined as against those defendants. That, however, cannot bar the trial of the issue as against the defendants appellants who were not parties to the former suit, and the court below was right in ordering a trial of that issue.

It is next urged that in view of Explanation VI to section 11 of the Code of Civil Procedure the former judgement must be held to be *res judicata*. This contention is, in my judgement, equally untenable. The parties to the former suit did not litigate in respect of "a private right claimed in common for themselves and others." The defendants to that suit set up their own right to a part of the property and also alleged that another part of the property belonged to the appellants to this appeal, but they did not assert any right which was common to all of them. In order that the explanation may be applicable, there must be community of interest, such as is referred to in order 1, rule 8. In the present case there was no community of interest. It is admitted that if in the former suit a decree had been passed in favour of the plaintiff, it would not have been binding on the appellants. Why then should it be binding because the suit was dismissed? In my judgement Explanation VI has no application to a case like this.

For the above reasons I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—The plaintiff, on the 26th of September, 1906, sued the defendants, Bhagat Deo and Rabinath, father of Kinkin Deo and Harbans Deo, in the court of an Assistant Collector of the first class for ejectment. The Assistant Collector held that the plaintiff was not the proprietress of the village and dismissed the suit on the 8th of March, 1906. That decision became final.

The plaintiff then brought the suit out of which this appeal arose in the court of the Subordinate Judge of Mirzapur, for a declaration that she was the owner of the village Jamvanwan. She, in addition to Bhagat Deo and the sons of Rabinath, made six others defendants. One of the pleas raised by all the defendants was that the suit was barred by *res judicata*.

The court of first instance found that it was so and dismissed the suit. The plaintiff appealed against all the defendants, and the learned District Judge holding that it was not barred against defendants Nos. 1, 2, 3, 4, 8 and 9, who were not parties to the suit of 1905, remanded the case under order XLI, rule 23. From the order of remand two appeals were preferred. One by the plaintiff (No. 67 of 1910) in which the contention was that the doctrine of *res judicata* was no bar to the suit against Bhagat Deo and the sons of Rabinath, and the other (No. 42 of 1910) by other defendants in which the contention was that the doctrine of *res judicata* barred the suit against them also.

Both appeals were heard by a Bench of three Judges. In F. A. f. O. No. 67 of 1910, this Bench, on the 7th of February, 1910, held that the suit against Bhagat Deo and the sons of Rabinath, was barred by the doctrine of *res judicata*.

After the delivery of judgement in F. A. f. O. No. 67 of 1910, F. A. f. O. No. 42 of 1910 was heard. The learned advocate for the appellants admitted that *res judicata* did not apply as the parties were not the same. He, however, pressed (1) that our decision in F. A. f. O. No. 67 of 1910, that the plaintiff was not the proprietress of Jamanwan, so far as Bhagat Deo and the sons of Rabinath were concerned, being in the one and the same suit must be deemed to be decision that she was not its proprietress against the appellants as well, for in the one and the same suit a plaintiff cannot be held to have no proprietary title against some of the defendants and to have it against the rest; (2) that Explanation VI of section 11 of the Civil Procedure Code applied to the case, and (3) that the appellants could plead a *jus tertii* and say that the ownership of the village in dispute belonged to other defendants and not to the plaintiff.

A fallacy lurks in the first contention and is the result of non-appreciation of the nature of the doctrine of *res judicata*. That doctrine with certain limitations *prohibits* a court of justice from deciding in a subsequent suit an issue which has been *decided* in a previous suit. When a court with reference to an issue involved in a subsequent suit is of opinion that *res judicata* bars the trial of that issue, it *refrains* from *deciding* that issue.

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To call this action of the court a *decision* of that issue in the subsequent suit is a misnomer and can in no way deprive it of the power of deciding that issue between the plaintiff and the rest of the defendants. It must be noticed that our judgement in F. A. f. O. No. 67 of 1910 is a judgement *in personam* and not a judgement *in rem*. So far, therefore, as the parties to the present case are concerned, it is *res inter alios judicata* and cannot bind them. The above principle is embodied in section 43 of the Indian Evidence Act (No. I of 1872) which is as follows:—"Judgements, orders or decrees other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgements, orders or decrees is a fact in issue or is relevant under some other provision of this Act." There are no words in the section to indicate that a judgement, order or decree for the purpose of being irrelevant must be in another suit. The words are wide enough to include a judgement, order or decree in the one and the same suit if the parties are different. A, a plaintiff, in the one and the same suit, may be held to be the owner of a village against B but not against C. Had the appellants in the case before us admitted that the plaintiff was the proprietress of the village, the court would have been bound to declare her to the owner of the village as against the appellants and to be no owner as against the others, and this would have been done in the one and the same suit.

The fallacy becomes clear if we suppose that the suit of 1905, instead of being dismissed, was decreed against Bhagat Deo and Rabinath and the plaintiff was held to be the owner of the village. In such case the court in F. A. f. O. No. 67 of 1910 would have come to the conclusion that, as the plaintiff had been found to be the owner of the village against Bhagat Deo and Rabinath, the retrial of her title against them was barred by the doctrine of *res judicata*. Could such a conclusion have entitled the plaintiff to contend that the court must hold her to be the owner of the village without giving the appellants an opportunity to prove otherwise, for a court in the one and the same suit could not hold that the one and the same plaintiff was the owner of the village against some defendants but not against the rest?

Such a contention would have been deemed ridiculous, and the mere fact that it was raised in a converse case could not alter its nature.

As a matter of procedure the appellants in F. A. f. O. No. 42 of 1910 can rely upon our decree in F. A. f. O. No. 67 of 1910, as a piece of documentary evidence and cannot call it in aid of their case in any other way. It therefore follows that unless their case is *tried* and the question that the plaintiff has no title against them is *decided*, they can be entitled to no decree. They, however, ask us to take what they think ought to be decided in their favour to have already been so decided. This cannot be done, and the learned advocate has not referred us to any principle or precedent that might support him.

Explanation VI, section 11, Civil Procedure Code, has no application to the case before us. In the suit of 1905, in the court of the Assistant Collector of the first class, no private right was claimed by Bhagat Deo and Rabinath in common for themselves and the appellants in F. A. f. O. No. 42 of 1910, and therefore the appellants before us could not be deemed to be claiming under Bhagat and Rabinath. There is no substance in the plea of *jus tertii*. The effect of that plea, when permitted to be raised, is that the plaintiff is called upon to prove a better title. That plea does not shut out the plaintiff from proving a better title, nor debar the court from deciding the question of title.

For the above reasons I would dismiss the appeal with costs.

KNOX, J.—I agree with my learned brothers in holding that the judgement in F. A. f. O. No. 67 of 1910 cannot operate as *res judicata* in bar of the suit out of which this appeal arises. The present appellants were no parties to the suit in which the judgement first named was passed. Explanation VI of section 11 of Act No. V of 1908, which the learned advocate for the appellants would have us apply, will not help the case. In the previous suit the right claimed was not a private right claimed by the parties to that suit in common for themselves and others. The appeal is dismissed with costs.

Appeal dismissed.