## PRIVY COUNCIL.

*February*, 24
*J. C.**
1931

MUNNI BIBI (SINCE DECEASED) AND ANOTHER (PLAINTIFFS) *v.* TIRLOKI NATH AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Allahabad.]

*Civil Procedure Code, section* 11—Res judicata *between co-defendants—Application of English decisions—Previous decree against Hindu woman—Decree binding reversioners.*

It is well settled by judgments of the Privy Council both that section 11 of the Code of Civil Procedure, 1908, is not exhaustive of the subject of *res judicata*, and that for the general principles applicable thereto it is legitimate to refer to decisions in the English Courts.

A decision operates as *res judicata* between co-defendants provided that (1) there was a conflict of interest between them, (2) it was necessary to decide that conflict in order to give the plaintiff the relief which he claimed, (3) the question between the co-defendants was finally decided.

*Cottingham* v. *Earl of Shrewsbury* (1), applied. *Ahmad Ali* v. *Najabat Khan* (2), *Ramchandra Narayan* v. *Narayan Mahadev* (3), and *Magniram* v. *Mehdi Hossein Khan* (4), approved.

In 1919 the appellant brought the present suit against the respondents claiming possession of a house the title to which had long been in dispute. In 1909 the holder of a decree against the appellant's father had sued for a declaration that he was entitled to execute the decree against the house; he joined as defendants the appellant, who did not appear, and a Hindu female who then represented the estate which had since devolved upon the respondents. It was held that the decree could be executed against the house.

*Held*, applying the principles above stated, that by the decision in the suit of 1909 the title to the house was *res judicata* in favour of the appellant as between her and her co-defendant, and the decree was equally binding upon the respondents as reversionary heirs, in the absence of proof that it was obtained by fraud or collusion.

*Risal Singh* v. *Balwant Singh* (5), followed.

Decree of the High Court reversed.

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**Present*: Lord TOMLIN, Sir JOHN WALLIS, and Sir GEORGE LOWNDES.

(1) (1843) 3 Hare, 627 (638)—67 E.R., 530 (533).
(2) (1895) I.L.R., 18 All., 65.
(3) (1986) I.L.R., 11 Bom., 216.
(4) (1903) I.L.R., 31 Cal., 95.
(5) (1918) I.L.R., 40 All., 593 (603).

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APPEAL (No. 15 of 1928) from a decree of the High Court (February 19, 1925) reversing a decree of the Subordinate Judge of Agra (February 8, 1922).

The suit was brought by Mst. Munni Bibi, the appellant since deceased, against the respondent for possession of a house at Agra, the title to which had been in dispute between the parties and their respective predecessors for many years. The defendants and their predecessors claimed title under a deed of gift made in 1864 by Joti Prasad to his wife Mukandi. The plaintiff's title rested upon the contention that the gift had not been completed and that upon a partition after Joti Prasad's death the house had been allotted to his son Amar Nath. In a suit brought in 1893 Kashi, Mukandi's daughter, had obtained a decree for possession against the widow of Amar Nath. In 1909 the holder of a decree against Amar Nath, then deceased, sued for a declaration that he was entitled to attach and sell the house in execution; he made Munni Bibi, the daughter of Amar Nath, and Kashi, the daughter of Mukandi, defendants. He obtained a decree on appeal, it being held that the decree of 1893 in favour of Kashi had been obtained by collusion. In the present suit the plaintiffs appellants contended that by the decree of 1909 the question of title was *res judicata* in their favour. The defendants respondents relied on the decree of 1893.

The facts appear more fully from the judgment of the Judicial Committee. The High Court, reversing the Subordinate Judge, dismissed the suit. The learned Judges (MEARS, C. J., and PIGGOTT, J.) held that the suit of 1893 had not been collusive as had been held by the trial judge, and that the decision operated as *res judicata* in favour of the defendants. They held that the decision in the 1909 suit did not so operate because Munni Bibi had not been a necessary party and had

collusively failed to appear. Apart from the question of *res judicata* they were of opinion that the gift to Mukandi had been completed and was effective. Accordingly they dismissed the suit.

1930. December 11, 12. *DeGruyther*, *K. C.*, and *Hyam*, for the appellants: The principle laid down in *Cottingham* v. *Earl of Shrewsbury* (1) as to *res judicata* between co-defendants has been applied in India in several cases: e.g. *Ahmad Ali* v. *Najabat Khan* (2), *Jadav Chandra* v. *Kailash Chandra* (3). Each of the three conditions laid down in the case last mentioned as being necessary existed in the present case. Section 11 of the Code of Civil Procedure is not exhaustive of the subject of *res judicata*: *Hook* v. *Administrator-General of Bengal* (4). Munni Bibi was a proper party to the suit of 1909 as the court had to decide title as between her and Kashi. The fact that Munni Bibi did not appear does not prevent the decision in her favour from being binding upon Kashi. It is conceded that the respondents do not claim through Kashi, but as reversionary heirs they are bound by the decree: *Katama Natchiar* v. *Rajah of Shivaganga* (5).

*Dunne*, *K. C.*, and *Dube*, for the respondents Nos. 1, 2 and 3: The decision in the 1909 suit did not operate as *res judicata* between the co-defendants because Munni Bibi did not really dispute the title of Kashi. Both courts below took the view that that was so. There was really no issue between them for the purpose of section 11 of the Code, which primarily governs the subject of *res judicata*. In *Hook*'s case (4) the earlier decision was in the same suit, so that although section 11 did not apply in terms, it applied *a fortiori*. The same consideration applies

(1) (1843) 3 Hare, 627—67 E.R., 530.
(2) (1895) I.L.R., 18 All., 65.
(3) (1916) 21 C.W.N., 693.
(4) (1921) I.L.R., 48 Cal., 499; L.R., (543, 609). 48 I.A., 187.
(5) (1863) 9 Moo. I.A., 539.

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to *Ramchandra Rao* v. *Ramchandra Rao* (1). The terms of section 11 should not be departed from save in exceptional cases.

*DeGruyther, K. C.*, in reply referred to *Kalipada De* v. *Dwijapada Das* (2).

February 24. The judgment of their Lordships was delivered by Sir GEORGE LOWNDES :—

The property in dispute in this appeal is a house in Agra, said to be worth Rs. 20,000. It has provided the parties with litigation for over forty years. It originally belonged to one Joti Pershad. On the 27th of January, 1864, he executed a deed by which he purported to give it to his wife, Bibi Mukandi, but it is said that the gift was not perfected by possession.

Joti Pershad died in 1870, and his two sons Bishamber Nath and Amar Nath succeeded to his property. If the house had been effectively transferred to Mukandi the sons clearly took no interest in it; but when they came to a partition in 1881 it was allotted to Amar Nath, who lived in it till his death in 1884. Thereafter his widow, Hira Dei, continued to live in it till her death in April, 1907, when, if it was the property of Amar Nath, it devolved on his daughter, the appellant, Munni Bibi.

Mukandi died in 1891, and if the deed of gift was effective the house then passed as her *stridhan* to her two daughters, Ratan Dei and Kashi Dei. Ratan died in 1894 childless, and Kashi in 1912; and assuming the title to have been with Mukandi, the house would now be the property of the first three respondents, who are descendants of Kashi.

It is between these conflicting claims that their Lordships are called upon to decide.

On the death of Hira, the widow of Amar Nath, the house was taken possession of by Gokal Nath, the

(1) (1922) I.L.R., 45 Mad., 320; L. R., 49 I.A., 120.

(2) [1930] A.L.J., 70; L.R., 57 I.A. 24.

son of Kashi, in the absence of the appellant, who was living with her husband in Patna, and she now sues for possession.

The respondents' case is that the house was from the date of the deed of gift Mukandi's property, and that the occupation by Amar Nath and Hira was merely permissive. Mukandi was not a party to the partition of 1881, but under an award of arbitrators by which it was effected certain benefits were conferred upon her in the shape of a monthly allowance of Rs. 250 and the transfer of another house at Muttra. Certain villages were also allotted to her daughters Ratan and Hira. The appellant contends that Mukandi had full knowledge of the award, and accepted the provision so made for her and her daughters, and that she should therefore be taken to have acquiesced in the allotment of the Agra house to Amar Nath.

Whether this was what really happened or not is, of course, in dispute, but both Amar Nath and Hira seem to have regarded themselves as the owners of the house. They mortgaged it on various occasions, but when the mortgagees attempted to enforce their security they were met by claims based on the deed of gift.

At Amar Nath's death in 1884 his property, which appears to have been considerable, was heavily encumbered, and it seemed likely that everything would be swallowed up by his creditors. A suit had been instituted against him in 1883 upon a mortgage which included the Agra house. This mortgage was attested by the husband and eldest son of Kashi, who also identified the mortgagors before the Registrar, and it is accordingly suggested that they could not have been ignorant of the transaction. On Amar Nath's death the suit was continued against Hira, and in June, 1889, a decree for sale was passed. In March, 1890, Mukandi intervened, claiming the house under the deed of gift, and her objection was allowed,

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but Hira still remained in occupation; the mortgage decree was apparently satisfied out of other assets.

Between 1885 and 1893 a number of mortgages were executed by Hira in which the house was included. In November, 1893, when it was evident that the situation was becoming critical, Ratan, the eldest daughter of Mukandi, who was then dead, instituted a suit against Hira and some of her mortgagees, claiming possession of the house and (in effect) a declaration that it was not affected by the mortgages. Kashi was at first made a defendant, on the allegation that she had refused to join in suit, but on Ratan's death pending the trial, she was substituted as plaintiff. Hira put in a written statement setting up her title as Amar Nath's widow, but at the hearing gave evidence in favour of Kashi Dei, and no reference was made to the award or to Mukandi's acquiescence. The result was that a decree was made in favour of the plaintiff.

Satisfied apparently with this assertion of her rights, Kashi left Hira in occupation as before, and in subsequent legal proceedings it was (not unnaturally, perhaps) suggested that this suit was collusive, and a mere device to save the house from the creditors of Amar Nath and Hira.

In October, 1896, Kashi, by deed, dedicated the house to the god Shri Joti Nath Mahadeo, and appointed Kanno Dei, the wife of her brother Bisham Dei Nath, *mutwalli* of it, but still no change was made in Hira's occupation, which continued, uninterruptedly, for another ten years.

In 1908, shortly after the death of Hira, one Narayan Singh, as the assignee of an old but apparently good decree against Amar Nath, attached the house in execution. Kanno, as *mutwalli* under the deed of 1896, objected to the attachment, and her objection was allowed. Thereupon Narayan Singh

instituted a suit, No. 337 of 1909, praying for a declaration of his right to attach and sell the house in execution of his decree. He joined as defendants Kanno and Kashi, and the present appellant Munni. His suit was dismissed in the first court, but decreed on appeal, and his right to realise his decree by sale of the house was affirmed. The decree of the appeal court was dated the 18th of January, 1912. By this time Kanno was dead, and Kashi seems to have died shortly afterwards. Thereupon her son, Gokal Nath, who would, if the house had been the property of Mukandi, have succeeded to it on Kashi's death, paid off Narayan Singh's decree and retained possession of the house. Munni's suit was instituted on the 11th of March, 1919, shortly before the expiry of the 12 years' period of limitation, and it comes before the Board after a further lapse of 11 years.

Having regard to the tangle of decisions referred to above, it is only to be expected that the plea of *res judicata* should find a prominent place in the story. In the 1909 suit it was put forward by the defendant Kashi, relying on the decision of 1893, but was decided against her with the result already stated. The same plea is put forward by the respondents in the present case. The appellant, on the other hand, contends that the decision in the 1909 suit is conclusive against the respondents.

The suit out of which the present appeal arises was first tried by the Subordinate Judge of Agra. He delivered his judgment on the 12th of March, 1920, and decreed the suit in the appellant's favour. He held that the question of title between Kashi and the appellant was *res judicata* by reason of the decision in the 1909 suit, and that it having been obtained "upon fair trial and after full contest," the respondents were bound. This decree was apparently set aside by the High Court and the suit ordered to be

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retried *de novo*, though the record before their Lordships does not disclose the reasons. On the retrial the contrary view was taken on the question of *res judicata*, but the same ultimate result was arrived at by the new Subordinate Judge on the question of title, and the appellant again succeeded. The respondents appealed, and the learned Judges of the High Court, while agreeing with the retrial judgment as to *res judicata*, came to a different conclusion as to title, holding that the deed of gift of 1864 was effective, and that the house was the property of the respondents.

The *ratio decidendi* of the two later pronouncements on the question of *res judicata* was that there had been in the 1909 suit no trial of the question of title as between Kashi and the present appellant, who were ranged as co-defendants. Before their Lordships the appellant contends that these decisions were wrong, and that the true view was that taken in the first judgment of the 12th of March, 1920.

It is, their Lordships think, clear that if this contention is correct, it is decisive of the present appeal, and they will now proceed to its consideration.

The doctrine of *res judicata* finds a place in section 11 of the Civil Procedure Code of 1908, but it has been held by this Board on many occasions that the statement of it there is not exhaustive; the latest recognition of this is to be found in *Kalipada De* v. *Dwijapada Das* (1). For the general principles upon which the doctrine should be applied, it is legitimate to refer to decisions in this country, see *Soorjamonee Dayee* v. *Suddanund Mohapatter* (2); *Krishna Behari Roy* v. *Brojeswari Chowdranee*, (3); *Run Bahadur Singh* v. *Lucho Koer* (4). That there may be *res judicata* as between co-defendants has been recognized

(1) [1930] A.L.J., 70; L.R., 57 I.A. 24.
(2) (1873) L.R., I.A., Supp., 212.
(3) (1875) L.R., 2 I.A., 283.
(4) (1884) I.L.R., 11 Cal., 301; L.R., 12 I.A, 23.

by the English Courts and by a long course of Indian decisions. The conditions under which this branch of the doctrine should be applied are thus stated by WIGRAM, V. C., in *Cottingham* v. *Earl of Shrewsbury*. (1): "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide that case, and the co-defendants will be bound; but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." This statement of the law has been accepted and followed in many Indian cases: see *Ahmad Ali* v. *Najabat Khan* (2), *Ramchandra Narayan* v. *Narayan Mahadev* (3), *Magniram* v. *Mehdi Hossein Khan* (4), It is, in their Lordships' opinion, in accord with the provisions of section 11 of the Civil Procedure Code, and they adopt it as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants. In such a case, therefore, three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided.

Their Lordships are of opinion that these conditions are established in the present case. There was clearly a conflict of interests between the appellant as the daughter and heir of Amar Nath, and Kashi, as the heir of Mukandi. It was only if the house belonged to Amar Nath that the plaintiff's suit could succeed; if it belonged to Mukandi he must fail. It was, therefore, necessary to decide between the conflicting claims of the defendants. The principal

(1) (1843) 3 Hare, 627 (638); 67 E.R., 530 (535).
(2) (1895) I.L.R., 18 All., 65.
(3) (1886) I.L.R., 11 Bom., 216.
(4) (1903) I.L.R., 31 Cal., 95.

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issue for decision in the 1909 suit was framed in the following terms :—"4. Was Babu Amar Nath owner of the disputed house? Is the house liable to be sold in execution of [the plaintiff's decree] ?"

This issue was found against the plaintiff by the trial Judge, and "as the result" of this finding his suit was dismissed. It was decided in his favour by the High Court, and his suit was decreed. It is not suggested for the respondents that this determination was not final.

It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position. The test of mutuality is often a convenient one in questions of *res judicata*. If the decision had gone the other way the appellant could hardly have claimed that because she did not choose to appear she was not bound by it, and so have compelled Kashi to litigate the matter over again; and if the appellant would have been bound, so must Kashi be. There is, however, evidence on the record of the present suit, emanating from one of the principal witnesses for the respondents, that the appellant did, in fact, support the plaintiff in the 1909 suit.

Their Lordships must, therefore, hold that the title to the house as between the appellant and Kashi is *res judicata* in the present suit by reason of the 1909 decision. This must equally bind the respondents unless it is established that it was procured by fraud or collusion. "Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the

reversionary heir." *Risal Singh* v. *Balwant Singh* (1). There is no suggestion in the present case that the 1909 suit was not fully fought by Kashi, nor is any allegation of fraud or collusion made against her in connection with her defence. Their Lordships therefore agree with the first Subordinate Judge that the decree passed by the High Court in suit No. 337 of 1909 binds the respondents, and is conclusive of the appellant's title as against them to the house in dispute.

Their Lordships greatly regret that the conclusion to which they have come will not end the lititgation between the parties. In their written statement the respondents claimed that the appellant could not in any event be entitled to recover possession of the disputed house without repaying to them a sum put at the figure of Rs. 7,200 and interest, which they alleged Gokal Nath had paid to free the property from Narayan Singh's decree, and the twelfth issue raised at the hearing was directed to this defence. Both the Subordinate Judges by whom the suit was tried held that this was a gratuitous payment, and refused the claim. The question was, however, raised again by the thirteenth ground of their memorandum of appeal, but was not dealt with by the learned Judges of the High Court, no doubt because in the view they took upon the main issues in the case this question did not arise.

It has been agreed before their Lordships that the necessary materials for the decision of this one outstanding point are not before them, and that if it should become material to deal with it the case must go back to the High Court. This contingency now arises, and their Lordships have no choice but to remit the appeal to the High Court for consideration of this issue upon such materials as are available.

(1) (1918) I.L.R., 40 All., (593); L.R., 45 I.A., 168 (178).

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For the reasons given their Lordships are of opinion that this appeal should be allowed, that the decrée of the High Court should be set aside, that it should be declared that the appellant's title to the Agra house, the subject of the suit, is established, but without prejudice to such claim, if any, as the respondents may have by reason of the alleged payment by Gokal Nath to Narayan Singh in satisfaction of his claim against Amar Nath's estate, and that this appeal should be remitted to the High Court for their decision upon the twelfth issue and the thirteenth ground of appeal; and their Lordships will humbly advise His Majesty accordingly. The defendants respondents will pay the costs of the appeal to the High Court and before this Board.

Solicitors for appellants: *Barrow, Rogers and Nevill.*

Solicitor for respondents Nos. 1, 2 and 3: *H. S. L. Polak.*

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## FULL BENCH.

*Before Sir Grimwood Mears, Chief Justice, Mr. Justice Mukerji and Mr. Justice Young.*

1930 *July*, 3.

NAZIR KHAN AND ANOTHER (PLAINTIFFS) *v.* RAM MOHAN AND ANOTHER (DEFENDANTS).*

*Evidence Act (I of 1872), section 91—Promissory note—Insufficiently stamped—Inadmissible in evidence—Oral evidence of loan whether admissible.*

It is not open to a party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provisions of section 91 of the Evidence Act.

In cases in which there is already a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note is afterwards

*Civil Revision No. 154 of 1927.