

LETTERS PATENT APPEAL.

*Before Sir Shadi Lal, Chief Justice and Mr. Justice
Broadway.*

ABID-UD-DIN AND ANOTHER (DEFENDANTS)
Appellants

versus

BISHARAT ALI AND OTHERS (PLAINTIFFS)	}	Respondents.
RAOOF-UD-DIN AND OTHERS (DEFENDANTS)		

Letters Patent Appeal No. 93 of 1925.

Res Judicata—*Matter which might have been made a ground of attack in the former suit, but which plaintiff was not bound to make.*

In a former suit the plaintiffs asked for the eviction of defendants as trespassers, but their suit was dismissed on the ground that both the parties were co-sharers in the property. In the present suit plaintiffs, recognising the defendants as co-sharers, contended that they were not entitled to build upon the joint land so as to exclude the plaintiffs from using it along with the other co-sharers.

Held, that the present suit was not barred by the rule of *res judicata* because though the matter which forms the ground of attack in the present suit might have been made a ground of attack in the former suit, the plaintiffs were not bound to do so.

Appeal under clause 10 of the Letters Patent from the judgment of Mr. Justice Harrison, dated the 20th January 1925.

SHAMAIR CHAND, for Appellants.

JAGAN NATH, AGGARWAL, and HARGOPAL, for Respondents.

JUDGMENT.

SHADI LAL C.J. SIR SHADI LAL C. J.—After hearing arguments on both sides we are of opinion that the suit brought by the plaintiffs is not barred by the rule of *res*

judicata. A perusal of the plaint in the former suit leaves no doubt that that suit was brought by the plaintiffs against the defendants on the ground that the latter were trespassers, but the Court holding that both the parties were co-sharers in the property dismissed the suit. In the present suit the plaintiffs, recognising the defendants to be co-sharers, contend that they were not entitled to build upon the joint land so as to exclude the plaintiffs from using it along with the other co-sharers. The matter which forms the ground of attack in the present suit might have been made a ground of attack in the former suit, but the plaintiffs were not bound to do so. The learned Judge was, therefore, justified in rejecting the plea of *res judicata*.

Our attention has, however, been invited to a mistake in the decree of the District Judge which directs the defendants to "vacate the site in question." As pointed out above, the defendants are co-sharers and they are entitled to remain in possession of the property along with the other co-sharers; and there is no reason why they should be evicted.

I would, therefore, accept the appeal so far as to direct that the plaintiffs shall obtain joint possession of the site in question with the defendants. In all other respects the appeal is dismissed with costs.

BROADWAY J.—I concur.

BROADWAY J.

A. N. C.

Appeal accepted in part.

1927

ABID-UD-DIN
v.
BISHARAT ALI.
SHADI LAL C.J.