APPELLATE CIVIL.

Before Broadway and Coldstream JJ.

ABDUL RAHIM (PLAINTIFF) Appellant

versus

FATEH ULLAH AND OTHERS (DEFENDANTS) Respondents.

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June 7.

Civil Appeal No. 2634 of 1926.

Res Judicata—*previous decision between co-defendants—on point whether a document is an award or not—whether* res judicata—*whether there must have been a distinct issue for trial — and active contest between the co-defendants — and whether a law point.*

Held, that in order to render a previous decision between co-defendants *res judicata* three conditions must be fulfilled, *viz.* (1) there must be a conflict between the defendants concerned, (2) that it must be necessary to decide the conflict in order to give the defendants the relief claimed, and (3) that the question must have been finally decided.

Mumni Bi v. *Tuloke Nath* (1), followed.

And that it is immaterial that no distinct issue on the point was struck for trial, and that as a fact there was no active contest between the co-defendants.

Dakhyani Debee v. *Dolegobind Chowdhry* (2), and *Maung Sain Done* v. *Ma Pan Myaan* (3), relied upon.

Held further, that the question whether a document is an award or not, is not one of law alone, but has to be determined with reference to the evidence of the circumstances on which the document concerned came to be executed and the decision in such a matter would operate as *res judicata*.

Moti Sagar v. *Dhanna Mal* (4), and *Dhanna Mal* v. *Moti Sagar* (5), distinguished.

First appeal from the decree of R. S. Lala *Dharu Lal, Revenue Assistant, exercising powers of a Subordinate Judge, 1st Class, Lyallpur, dated the 6th July, 1926, dismissing the plaintiff's suit.*

(1) (1931) I. L. R. 53 All. 103 (P. C.). (3) (1932) 137 I. C. 328 (P. C.).
(2) (1894) I. L. R. 21 Cal. 430. (4) (1923) 72 I. C. 177.
(5) (1927) I. L. R. 8 Lah. 573 (P. C.).

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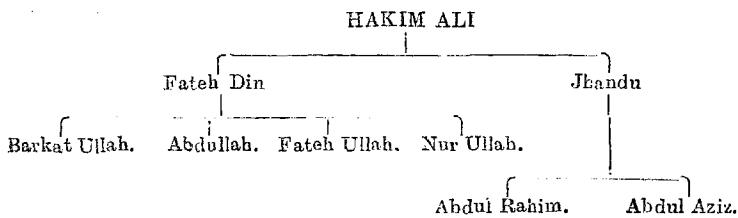
J. N. AGGARWAL and MEHR CHAND MAHAJAN, for Appellant.

BADRI DAS and IQBAL SINGH, for Respondents.

COLDSTREAM J.—This judgment will dispose of the two appeals Nos. 2634 and 2635 of 1926, the facts and the questions for decision in which are admittedly the same. The suits from which they arise related to areas of land in *Chak* 207 and *Chak* 224 in the Chenab Colony in the Lyallpur District. These lands were acquired in the time of Fateh Din (father of Fatteh Ullah, Abdullah, Nur Ullah and Barkat Ullah) and his brother Jhandu, father of Abdul Rahim and Abdul Aziz, Arains, originally of Jullundur District.



Fateh Ullah and Abdullah applied to the revenue authorities in 1922 for partition of the lands. Their applications were opposed by Abdul Rahim, who asserted that the lands had been partitioned by an arbitrator on the 10th January, 1920, and that the sons of Fateh Din and Jhandu had taken possession of their allotted shares (some areas having been left joint) in accordance with the arbitrator's award.

The parties were referred to the Civil Court, and on the 1st September, 1925, Abdul Rahim instituted two suits in respect of the land in the two *Chaks* which he claimed to be his by virtue of the arbitration, praying for a declaration against the sons of fateh Din to the effect that the lands had been partitioned and

that Fateh Ullah's and Abdullah's applications for partition were not competent. Abdul Rahim's brother, Abdul Aziz, was impleaded as a *pro forma* defendant.

The suits were resisted by the sons of Fateh Din (the petitioners for partition and their two brothers) who, while admitting that the lands had been partitioned in 1920 for temporary purposes, denied that there had been any final partition by virtue of an award. They also pleaded that the document put forward by the plaintiff as the alleged award marked as Exhibit P. W. 8/A. B. was not admissible in evidence for want of registration.

The suits were tried together by the Revenue Assistant, Lyallpur, in exercise of his powers as a Subordinate Judge of the first class, proceedings being recorded for the most part in the suit relating to the land in *Chak* 207 (appeal No. 2634 of 1926) and the following issues were struck:—

1. Has the land in dispute been finally partitioned?

2. Is the registration of the deed of partition, attached to the record of the case, not compulsory?

3. If compulsory, what is its effect?

After hearing one witness, produced by the plaintiff, and before the examination of the second (Attar Chand, *Patwari*), had been concluded, the Subordinate Judge, on the 1st March, 1926, struck two more issues on a plea raised by the plaintiff, that the question of the admissibility of the document recording the alleged award was *res judicata*. The issues framed were—

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1. Has it been decided in a Civil Court that the registration of the deed of partition is not compulsory?

2. What is its effect?

The hearing was adjourned "for citing the law." On the 15th April, 1926, the proceedings were again adjourned with the approval of counsel on both sides pending the arrival of the records of "all cases between the parties," which had been requisitioned from the High Court, as the presence of these records was necessary "for the decision of the case and disposal of the additional issues and for the advancement of arguments." Arguments were heard on the 22nd June, and on the 6th July, 1926, the Subordinate Judge gave judgment against the plaintiff holding that the document in dispute was a deed of partition compulsorily registrable under section 17 of the Indian Registration Act, and that other evidence in proof of its contents could not be heard.

Against this decision the plaintiff Abdul Rahim has preferred the two appeals before us through Mr. Jagan Nath Aggarwal.

Mr. Jagan Nath's contentions are, firstly, that the document in question was determined, rightly or wrongly, to be an *award* (and therefore not compulsorily registrable under section 17 of the Indian Registration Act) in a suit to which the appellant and the respondents were party (Nur Ullah *versus* Abdul Rahim, etc.), decided by the Senior Subordinate Judge of Lyallpur on 21st May, 1923, and that this decision made the question *res judicata*; secondly, that, if the question was still open for adjudication, the finding that the document was a dispositive

deed of partition is incorrect, for the document was merely a recital of a previously completed arrangement by an arbitrator, and, thirdly, that even if the document was one compulsorily registrable the equitable doctrine of part performance ought to have been applied and the partition given effect.

The dispute over the lands first appears to have arisen after the death of Jhandu in 1900. An account of the previous litigation between the parties is given in the judgment by the Senior Subordinate Judge of Lyallpur, dated the 21st May, 1923, mentioned above (at page 26 of the printed book). The suit (No. 266) decided by that judgment was instituted by Nur Ullah (the fourth defendant in the present suit) for possession of five squares of land in *Chak* 224 (part of the property now in suit) which he claimed to be his separate property by virtue of a bequest by one Bathu. All the parties to the present suit were impleaded as defendants. The suit was contested by Abdul Rahim and his brother only. They pleaded that Bathu was merely a *benamidar* for Fateh Din and Jhandu who had really acquired the land, to which all the sons of Fateh Din and Jhandu were entitled to succeed, and asserted that there had been a compromise between the parties resulting in the five squares in dispute being included in a general partition of properties between the sons of Jhandu and the sons of Fateh Din. In proof of their case Abdul Rahim and Abdul Aziz relied upon the document now under consideration as evidence of the fact that a partition had followed the compromise. Objection was taken by Nur Ullah to the use of this evidence on the ground that the document was a partition deed and was inadmissible under the provisions

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of section 91 of the Indian Evidence Act. The learned Subordinate Judge overruled the objection holding that (*i*) in any case the document was admissible to prove the fact of partition, citing on this point *Wazir Ali and Amir Ali* v. *Mahbub Ali, etc.* (1) and (*ii*), that the document was an award and therefore exempt from registration under clause (*vi*) of subsection (2) of section 17 of the Registration Act. The question is whether this decision is now binding on the defendant respondents.

For the respondents Mr. Badri Das contends that the decision of 1923 cannot operate as *res judicata* because in the previous suit there was no conflict between Abdul Rahim the present appellant, and the contending respondents, the sons of Fateh Din. He also takes the point that the previous decision was not upon a matter directly and substantially in issue in the former suit. He contends, lastly, that the matter decided was one of pure law and therefore always open to redecision.

If these contentions prevail the decision of the trial Court must, Mr. Badri Das argues, be upheld, for the document is not an award (and Mr. Jagan Nath does not argue that it is), but clearly a dispositive document purporting to record an agreement to partition.

The previous suit, as already noted, was instituted by Nurullah and contested by Abdul Rahim and Abdul Aziz, the sons of Jhandu, Nurullah's brothers being joined as defendants *pro forma*. The judgment in the suit itself emphasized the fact that the sons of Fateh Din had "a common interest against

(1) 10 P. R. 1917.

the sons of Jhandu," while Barkat Ullah had actually been acting for Nurullah as his best friend. On one side it was contended that there had been a compromise settling the title in the five squares then in suit; on the other, this was denied, and it is manifest that in this conflict Nurullah's brothers admitted Nurullah's exclusive title in the suit property—a position wholly inconsistent with the claim set up by Jhandu's sons. It seems to me impossible to hold in the circumstances that there was no conflict between the sons of Jhandu and their co-defendants, Nurullah's brothers, on the question whether there had been a valid compromise. For the decision of this question it became necessary to adjudicate on the plea that there had been a partition in furtherance of the compromise. This adjudication could not be effected without determining whether the document concerned was admissible in evidence, a question necessary for the decision of the suit and therefore a matter directly and substantially in issue between the parties. The mere fact that no distinct issue on the point was struck for trial is immaterial [see *Dakhyani Debee* v. *Dolegobind Chowdhry* (1)] as is the fact that there was no active contest between the co-defendants [see *Maung Sain Done* v. *Ma Pan Myuan* (2)]. The circumstances in the present case thus appear to me to fulfil the three conditions laid down as requisite for the application of the rule of *res judicata* between co-defendants by their Lordships of the Privy Council in *Munni Bi* v. *Tuloke Nath* (3), namely, that (*i*) there must be a conflict between the defendants concerned, (*ii*) that it must be necessary to decide the conflict in order to give the defendants the

(1) (1894) I. L. R. 21 Cal. 430. (2) (1932) 137 I. C. 328 (P. C.).
(3) (1931) I. L. R. 53 All. 103.

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relief claimed (had the plaintiff succeeded the sons of Jhandu could have appealed on the ground that their evidence had been improperly excluded) and (*iii*) that the question must have been finally decided.

In pressing his argument that the matter decided in the previous suit (*i*) was a question of law alone, (*ii*) the decision of which must always be open to re-decision in a subsequent suit, Mr. Badri Das has referred us to *Moti Sagar* v. *Dhannu Mal* (1), a judgment of this Court which came before the Privy Council in further appeal. The judgment of their Lordships of the Privy Council is published as *Dhannu Mal* v. *Moti Sagar* (2).

In that case it was decided that a document purporting to be a lease could not be regarded as something other than a lease simply because it was a unilateral document. It was also held that the question whether, on these facts proved, the defendants in the case were mere tenants at will (as contended by the plaintiff) or were entitled to a permanent inheritable right subject to payment of a fixed rent, was one of law, a previous decision of which did not operate as *res judicata*, and was also open to review by the High Court on second appeal.

I see nothing in these judgments compelling us to hold that in this case the question whether the document in dispute is an award or not is again open to redecision.

The judgments show that the lease put forward in that case was admittedly one which created a tenancy, and the matter in issue was merely the question whether a lease drawn up as a unilateral docu-

(1) (1923) 72 I. C. 177. (2) (1927) I. L. R. 8 Lah. 573 (P. C.).

ment was or was not a document compulsorily registrable under the Registration Act. No question of *res judicata* arose in connection with this point. In the case now before us the matter in issue (the question whether the document was an award or not) was clearly not one of law alone, but had to be determined with reference to the evidence of the circumstances on which the document concerned came to be executed. The decision in such a matter may certainly operate as *res judicata*. For this there is ample authority to which I do not think it necessary to refer.

The Privy Council in the course of their judgment certainly found that in the particular case before them, the question whether a tenancy was permanent or precarious was not itself a question of fact which could be agitated in second appeal, but their decision that the question was not a *res judicata* by means of a previous decision of the District Judge was not, it seems, based on this finding, but on the ground stated at page 580 of the Indian Law Reports, namely, that the District Judge must be taken to have withdrawn his previous decision. As pointed out by Broadway, J., in the judgment of this Court, the District Judge had not in the previous litigation come to any definite decision on the point. Indeed, the nature of the tenancy had never been adjudicated upon (page 1923 of the report in Indian Cases).

I am, therefore, of opinion that the decision of the Senior Subordinate Judge, Lyallpur, in Suit No. 266 that the document, Exhibit P. W. 8/A. B., is in fact an award and therefore admissible in evidence although unregistered is binding on Nurullah's brothers and was not open to revision in the case before us.

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On this conclusion the appeals must succeed, and it is not necessary to discuss at length the other contentions urged by appellant's counsel. I think it proper, however, to record that I fail to see why in a case like this the equitable doctrine of part performance could be applied even if it was open to us to apply it in face of the statutory provisions of the Indian Law of Evidence. The admitted fact that the parties are individually in possession of separate and approximately equal areas of the suit property is not incompatible with the defendants' plea that no final partition has taken place and by itself does not show that an award has been acted upon. It is conceded by Mr. Jagan Nath that there is no evidence showing that in the land revenue records the parties are shown as exclusive owners of the areas in their possession.

My decision that the document, Exhibit P. W. 8/A. B., must be held to have been decided, as between parties, to be an award, and therefore exempt from compulsory registration must not, of course, be understood to go any further than is expressed by these words. The question whether there was a final partition giving effect to a compromise and determining the parties' title in the areas taken into possession still remains to be decided. The learned Subordinate Judge who decided Suit No. 266 did not express any clear decision upon it.

I wish to add here that if it had still been open to us in spite of the previous decision, to come to a finding on the question whether the document under consideration is or is not an award, we could not have decided it until the parties had been given opportunity to produce all their evidence relating to the

circumstances in which the document was drawn up and signed by the parties. The plaintiff had summoned two more witnesses. We do not know what evidence they would have given. As already stated, the learned Subordinate Judge abruptly closed the evidence and proceeded to decide the suit before the plaintiff's evidence was complete. His decision on the point of *res judicata* certainly made it necessary for him to proceed to decide what was the nature of the document concerned, but to do this it was surely necessary for him to hear all the evidence relevant to the question.

The result is that the appeals are accepted and the cases remanded to the Lower Court for redecision in view of this Court's ruling that the document, Exhibit P. W. 8/A., is admissible in evidence. The Subordinate Judge will hear and consider such further evidence as the parties were entitled to produce. I note that the Lower Court appears to have disregarded the rules regarding the production and proof of documents, having apparently admitted to the record a mass of documents which have not been formally proved or even stated to be relied upon by the parties.

It is reasonable to suppose that some of these documents would have been proved by the *Patwari*, P. W. 2, had his evidence not been summarily cut short. Both parties wished the Court to refer to the previous records to which the order of 15th April, 1926, relates, but the mere request of a counsel that a record should be sent for does not by itself result in placing on evidence every document contained in that record. The attention of the Lower Court is

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drawn to *Maya Dhari* v. *Chunni Lal* (1), which describes the procedure to be followed.

The costs of these appeals will be paid by the respondents.

BROADWAY J.

BROADWAY J.—I agree.

A. N. C.

Appeals accepted;
Cases remanded.

REVISIONAL CIVIL.

Before Tek Chand J.

1932

June 15.

KANSHI RAM (PLAINTIFF) Petitioner

versus

DULE RAI AND COMPANY (DEFENDANT) Respondent.

Civil Revision No. 488 of 1931.

Civil Procedure Code, Act V of 1908, section 20 (b): Jurisdiction—sub-office receiving and disbursing moneys—whether 'carries on business'—Orders not binding till accepted by head office—whether material.

The plaintiff who resides at, and carries on, business at Amritsar instituted his suit for rendition of accounts at that place against the defendant, whose head office is at Bombay but who carried on a regular sub-office at Amritsar at which the defendant firm conducted all correspondence with customers at Amritsar. Both orders and moneys were proved to have been received and disbursed by this sub-office which in some cases passed receipts. On being summoned with his books, the defendant withheld production without reasonable cause.

Held, that in these circumstances the defendant was 'carrying on business' at Amritsar, the Courts of which place had accordingly jurisdiction to try the suit; and the fact that orders placed by customers with the Amritsar sub-office were not binding until they had been accepted by the head office at Bombay, was, therefore, immaterial.

(1) (1930) 31 P. L. R. 926.