APPELLATE CIVIL.

Before Coldstream and Din Mohammad JJ.

GAHRA AND OTHERS (DEFENDANTS) Appellants,

versus

MST. PANAH BIBI (PLAINTIFF) Respondent.

May 7. 1937

Regular Second Appeal No. 718 of 1936.

Res Judicata — *whether applies — where in the previous suit the parties were co-defendants and the issue was decided* inter se — *Necessary conditions for the applicability of* res judicata, *explained.*

A. acquired tenancy rights under the Colonization of Government Lands (Punjab) Act, 1912. On his death his son B. succeeded him. On B.'s death these rights were mutated in the name of his widow, and on her death mutation was effected in the name of her husband's collaterals C. and D. Thereupon A.'s surviving daughter and the son of another daughter instituted a suit against the collaterals claiming succession to the tenancy rights. In this suit *Mst.* P. daughter of B. was impleaded as a defendant, as she claimed to have prior rights to both the plaintiffs and the defendants C. and D. The latter resisted her claim as well as that of the plaintiffs. The Court dismissed the suit on the finding that the person really entitled to succeed was *Mst.* P. as she had a better claim than that of both the plaintiffs and defendants C. and D. *Mst.* P. thereafter brought the present action against the descendants of C. and D. claiming possession of the tenancy. The question for determination was whether the former suit operated as *res judicata* in respect of *Mst.* P.'s superior title of succession.

Held, that the plea of *res judicata* can prevail, even if the contesting parties in the subsequent suit, or those through whom they claim, were ranged as co-defendants in the previous suit; provided that three conditions are fulfilled, *viz.*, (1) there must be 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.

Held further, that it is nonetheless an adjudication because its consequence was the dismissal of the previous suit.

GAHRA
v.
MST. PANAH BIBI.

Munni Bibi v. *Tirlok Nath* (1), *Maung Sein Done* v. *Ma Pan Nyun* (2) and *Kedar Nath* v. *Ram Narain Lal* (3), followed.

Midnapore Zamindari Co. v. *Naresh Narayan Roy* (4), *Venkayya* v. *Narasamma* (5) and *Magniram* v. *Mehdi Hossein Khan* (6), referred to.

Held consequently, that *Mst.* P.'s claim must succeed as all the three conditions were fulfilled in the previous suit and the question of *Mst.* P.'s title could, therefore, not be re-opened.

Regular Second Appeal from the decree of Sardar *Teja Singh, District Judge, Jhang, at Sargodha, dated 18th March, 1936, affirming that of* Lala *Mela Ram, Subordinate Judge, 1st Class, Jhang, dated 8th October, 1934, awarding the plaintiff possession of the land in dispute.*

GHULAM MOY-UD-DIN KHAN and ABDUL AZIZ KHAN, for Appellants.

BARKAT ALI, for Respondent.

JUDGMENT.

DIN MOHAMMAD J.

DIN MOHAMMAD J.—The facts of the case giving rise to this appeal may shortly be stated. One Shahra acquired tenancy rights in the land in suit under the provisions of the Colonization of Government Lands (Punjab) Act, 1912. On his death in 1914, his son Sardara succeeded to his rights. When Sardara died in 1920, these rights were mutated in the name of his widow *Mussammat* Samon, and on her death in 1927, the mutation was effected in the names of Bahawal and Shahamad, who were related to Sardara in the third degree. Thereupon *Mussammat* Daulan, the daughter of Shahra, and Alia, the son of

(1) I.L.R. (1931) 53 All. 103 (P.C.). (4) I.L.R. (1924) 51 Cal. 631 (P.C.).
(2) I.L.R. (1932) 10 Rang. 322 (P.C.). (5) I.L.R. (1888) 11 Mad. 204.
(3) (1935) 37 P.L.R. 624 (P.C.). (6) I.L.R. (1904) 31 Cal. 95.

another daughter of Shahra, instituted a suit against Bahawal and Shahamad, claiming the rights now in suit for themselves. During the pendency of this suit *Mussammat* Panah Bibi, the only surviving daughter of Sardara, made an application for being made a party to the suit, asserting priority over both the plaintiffs and the defendants in that suit. She was accordingly impleaded as a defendant. Bahawal and Shahamad resisted her claim as well as that of *Mussammat* Daulan and Alia and on the pleadings of the parties, an issue was struck, among others,

"Whether the defendants 1 and 2 (Bahawal and Shahamad) are heirs *qua* the land in suit as against the plaintiffs and defendant No.3 (*Mussammat* Panah Bibi)." This issue was discussed at length in the judgment of the trial Court (P/2) and finally decided against Bahawal and Shahamad both in relation to the plaintiffs and *Mussammat* Panah Bibi. The result no doubt was that the suit of *Mussammat* Daulan and Alia was dismissed but it was simply on account of the finding that the person really entitled to succeed was *Mussammat* Panah Bibi and that she took precedence of both Daulan and Alia, the plaintiffs and Bahawal and Shahamad the defendants. Having secured this victory over her rivals, *Mussammat* Panah Bibi brought the present suit against the descendants of Bahawal and Shahamad (who had died in the meantime), claiming possession of the tenancy rights left by Sardara. She averred among other things that the question of her title to succeed to the tenancy rights in suit in preference to Bahawal and Shahamad, having been substantially in issue in the former suit and finally decided in her favour, could not be re-agitated in the present suit. The descendants of Bahawal and Shahamad demurred to this proposition

1937

GAHRA
v.
MST. PANAH BIBI.

DIN MOHAMMAD J.

and pleaded that as both their predecessors and *Mussammat* Panah Bibi were arrayed as co-defendants in the previous suit, the decision on the question of *Mussammat* Panah Bibi's title, even though adverse to them, could not operate as *res judicata*, especially as the previous suit had been dismissed as against them and they had no right to appeal against the adverse finding. Their contention, however, did not find favour with the Subordinate Judge and *Mussammat* Panah Bibi's suit was decreed. On the merits, too, the decision went in her favour. The defendants appealed to the District Judge but he, too, agreed with the Subordinate Judge on both the points at issue. It is against this decision that the present appeal has been preferred.

The principal question that falls for determination in this case is, whether the defence put forward by the descendants of Bahawal and Shahamad as to the ineligibility of *Mussammat* Panah Bibi to succeed to the land in suit in preference to their predecessors is barred by the rule of *res judicata*. If the decision of this matter goes against the descendants of Bahawal and Shahamad, no other question arises in the case. That the plea of *res judicata* can prevail, even if the contesting parties in the subsequent suit or those through whom they claim were ranged as co-defendants in the previous suit, has been finally settled by their Lordships of the Privy Council in a succession of cases and cannot now be disputed. Reference in this connection may be made to three comparatively recent judgments reported in *Munni Bibi* v. *Tirlok Singh* (1); *Maung Sein Done* v. *Ma Pan Nyun* (2) and *Kedar Nath* v. *Ram Narain Lal* (3). It was, however, laid

(1) I.L.R. (1931) 53 All. 103 (P.C.). (2) I.L.R. (1932) 10 Rang. 322 (P.C.).
(3) (1935) 37 P.L.R. 624 (P.C.).

down in the first of these cases and approved of in all subsequent decisions that before this plea can prevail, three conditions are necessary to be fulfilled :—

" (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 " *Munni Bibi* v. *Tirlok Nath* (1).

It was further observed in the second case " it was not any less an adjudication because its consequence was the dismissal of the suit, than it would have been if its tenor had been the other way." *Maung Sein Dona* v. *Ma Pan Nyun* (2).

The controversy before us, in the light of these decisions, is narrowed down to this, whether the three foregoing conditions have been fulfilled.

So far as conditions (1) and (3) are concerned, there can be no doubt that they are amply satisfied in the present case. There was obviously a conflict of interest between *Mussammat* Panah Bibi on one side and Bahawala and Shahmad on the other, and that conflict was with the approval of the parties concerned resolved into the form of an issue. Bahawal and Shahamad were called upon by the terms of the issue framed to establish their title both against the plaintiffs in the previous suit, and the hostile defendant, *Mussammat* Panah Bibi. This conflict was adjudicated upon and though the decision that followed resulted in the dismissal of the suit against Bahawal and Shahamad, it went clearly against them both as regards their conflict with the plaintiffs and

(1) I.L.R. (1931) 53 All. 103 (P.C.). (2) I.L.R. (1932) 10 Rang. 322 (P.C.).

1937

GAHRA
v.
MST. PANAH BIBI.

DIN MOHAMMAD J.

their conflict with *Mussammat* Panah Bibi. The decision was unequivocal. It proceeded on the material brought on the record by the disputants. It was deliberate. In these circumstances, the inevitable conclusion is that these two conditions are established.

As regards the third condition however, the position is not so simple. The descendants of Bahawal and Shahamad contend that in order to give relief to *Mussammat* Daulan and Alia, it was not necessary to decide the conflict between their predecessors and *Mussammat* Panah Bibi. On behalf of *Mussammat* Panah Bibi, on the other hand, it is urged that, in the first instance, Bahawal and Shahamad themselves joined issue with her and after having raised that issue, the defendants who claim through them cannot now be allowed to say that it was unnecessary. Secondly, it is not for this Court to determine whether the issue was necessary or not. As laid down in *Midnapore Zamindary Co., Ltd.* v. *Naresh Narayan Roy* (1), this was the function of the Court that decided the question then, and as that Court had treated it as necessary and decided it as such, the Court subsequently dealing with the matter was debarred from reopening the question of its necessity. And thirdly, the decision on the question was necessary, as in the triangular fight that was proceeding, the Court was bound to determine the relative position of the various parties concerned in the case and could not avoid the decision of the conflict between her on one side, and Bahawal and Shahamad on the other.

After giving due consideration to the arguments advanced on both sides, I have come to the conclusion that this appeal must fail. The principle on which the doctrine of *res judicata* is based is to give finality

(1) I. L. R. (1924) 51 Cal. 631 (P. C.).

to decisions arrived at after contest and to save successful litigants from unnecessary harassment over again. The statement of this doctrine, as remarked by their Lordships of the Privy Council in the judgments referred to above, is not exhaustive. Cases may arise where this doctrine may apply even if they are not entirely covered by the letter of the law as embodied in section 11, Civil Procedure Code. In the present case, *Mussammat* Panah Bibi was impleaded as a defendant to the knowledge and with the consent of all concerned, and was allowed to raise the question of her title. The contest that ensued was directed to finding as to which of the three rival sets of claimants was entitled to succeed to the land now in suit and the decision was that neither *Mussammat* Daulan and Alia nor Bahawal and Shahamad could inherit the estate in the presence of *Mussammat* Panah Bibi and that she alone was the rightful claimant. In the language of their Lordships of the Privy Council in *Munni Bibi* v. *Tirlok Nath* (1), the test of mutality is often a convenient one in questions of *res judicata*. If the decision had gone the other way, *Mussammat* Panah Bibi could hardly have claimed that she was not bound by it and so have compelled Bahawal and Shahamad to litigate the matter over again, and if *Mussammat* Panah Bibi would have been bound, so must Bahawal and Shahamad be.

Moreover, it is too late in the day for Bahawal and Shahamad now to contend that it was not necessary to adjudicate upon their conflict with *Mussammat* Panah Bibi. They deliberately accepted this position in the previous suit and cannot now be allowed to repudiate it. In *Midnapore Zamindary Co., Ltd.* v. *Naresh Narayan Roy* (2) their Lordships of the Privy

(1) I.L.R. (1931) 58 All. 103 (P.C.). (2) I.L.R. (1924) 51 Cal. 631 (P.C.).

1937

GAHRA
v.
MST. PANAH BIBI.

DIN MOHAMMAD J.

Council approvingly referred to the judgment of the Calcutta High Court under appeal, which contained the following significant observations :—

"It is quite clear from the above that the then defendant's case was present to the minds of the Court. The learned Judges then proceeded to decide it * * *. If the learned Judges had thought the issue unnecessary, they would presumably have said so and not decided it. But they did decide it. Can it be said under these circumstances that the point was not raised, that the Court did not consider it to be a necessary issue and did not impliedly decide that it was necessary and did not decide the issue on the merits? * * * * We ought not, we think, to assume that the Judges discussed a question which was irrelevant to the case and then granted no relief in respect of it; but rather that as they had discussed and negatived the alleged tenancy right in the judgment, they intended to and did give a decree which should give effect to these findings."

It is clear, therefore, that the Court which had to determine the question of the issue being necessary or not was the Court that decided the previous suit and if the parties forced the decision of the issue upon the Court and obtained its finding thereon, they must in all fairness be compelled to abide by it.

Further, it is clear from the judgment, Ex.P.2, that it was essential to decide the conflict between *Mussammat* Panah Bibi on one side and Bahawal and Shahamad on the other, in order to determine whether the suit of *Mussammat* Daulan and Alia was to be decreed or dismissed. But for the fact that *Mussammat* Daulan and Alia were found to be inferior heirs to *Mussammat* Panah Bibi, their suit would have been

decreed against Bahawal and Shahamad. The suit was ultimately dismissed simply because the trial Court, while judging the relative claims of *Mussammat* Panah Bibi and Bahawal and Shahamad, came to the conclusion that *Mussammat* Panah Bibi as daughter of the last male owner, Sardara, ousted the collaterals of Shahra in respect of the property acquired by Shahra himself. I fail to understand how it is possible to contend that an adjudication on this point could be avoided. I would hold, therefore, that condition No.3 also is fulfilled.

On the general question of *res judicata* between the co-defendants, *Venkayya* v. *Narasamma* (1) and *Magniram* v. *Mehdi Hossein Khan* (2) may also be perused with advantage.

There is also no force in the contention that inasmuch as the previous suit had been dismissed, Bahawal and Shahamad could not appeal against the decision arrived at in that case. There is ample authority in support of the proposition that in certain circumstances a defendant against whom a suit is dismissed has a right of appeal, see *Krishna Chandra* v. *Mohesh Chandra* (3) and Mulla's Civil Procedure Code, P.322. Even in the facts set out by their Lordships of the Privy Council in *Kedar Nath* v. *Ram Narain Lal* (4), reference is made to a case in which the Court, while dismissing a plaintiff's suit, had decided that the defendant, too, was not entitled to hold the property in suit and in that case both parties had appealed. Their Lordships of the Privy Council, while referring to it, have not made any adverse remarks on the procedure adopted or on the appeal filed by the defendant against whom the suit had been dismissed. In the

(1) I. L. R. (1878) 11 Mad. 204.
(2) I. L. R. (1904) 31 Cal. 95.
(3) (1905) 9 Cal. W. N. 584.
(4) (1935) 37 P. L. R. 624 (P. C.).

1937

GAHRA
v.
MST. PANAH BIBI.

DIN MOHAMMAD J.

previous suit, it had clearly been found that Bahawal and Shahamad could neither assert their title against *Mussammat* Daulan and Alia nor against *Mussammat* Panah Bibi, and it was obviously their duty to appeal against that order if they wanted to escape its consequences.

I would, accordingly, hold that the question of *Mussammat* Panah Bibi's title having once been decided in her favour by a competent Tribunal cannot now be reopened. As a result, I would dismiss this appeal. In view of the complicated question of law involved in the case, however, I would leave the parties to bear their own costs before us.

COLDSTREAM J. COLDSTREAM J.—I agree.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

1937

May 19.

Before Tek Chand and Abdul Rashid JJ.

YEATS (PLAINTIFF) Appellant,

versus

DICKINSON AND OTHERS (DEFENDANTS) Respondents.

Civil Regular First Appeal No. 420 of 1936.

Indian Copyright Act, III of 1914, Sch. 1, SS. 5, 6, and 7 — Assignment of Copyright — Publishing agreement — Damages for conversion under S. 7.

By a written agreement, the plaintiff, an author, granted to a publishing Company the sole and exclusive license to print, publish and sell, in book forms, his poetical non-dramatic works in a volume entitled ' Collected Poems.' The published price of the book was fixed in the agreement, and the Company agreed to pay to the author 20 *per cent* of the published price on all copies of the book which they might sell. All rights in the book other than those granted to the Company were reserved by the author, and it was expressly stated that the entire copyright of the book would remain