

1871  
 THE QUEEN  
 v.  
 DURGA DAS  
 BHUTTA-  
 CHARJEE.

The Magistrate who referred this case to the High Court, thought this order illegal. He said that the Deputy Magistrate ordered the money to be realized from the accused himself, "being under the impression that the accused gave his own recognizance to appear. But as a matter of fact, he did not give it; and therefore the money could not be demanded from him.

With reference to the order against the surety, the Magistrate remarked that it was the Deputy Magistrate's duty, under section 220 of the Criminal Procedure Code, to give notice to the surety to pay or to show cause why he should not pay the penalty mentioned in the bond; but no notice was given to the surety. It seems the Deputy Magistrate in his explanation said that he had given the surety a verbal notice. With reference to this, the Magistrate observed that a mere verbal and unrecorded order to show cause would not have been sufficient even if it had actually been given.

The judgment of the Court was delivered by

NORMAN, J.—The order of the Deputy Magistrate is illegal, and must be quashed for the reasons mentioned in the Magistrate's letter.

There seem to be several other objections to it.

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Lock.*

1871  
 March 23.

NABIN CHANDRA MAZUMDAR (PLAINTIFF) v. MUCTA SUNDARI DEBI AND OTHERS (DEFENDANTS).\*

*Res Judicata—Bar to Suit.*

S. died in 1865, leaving two sons, N. and G. M. took possession of the property of S. under a will alleged by her to have been executed by S. In 1867, G. brought his suit, as one of the heirs of S., to set aside the will, and made his brother N. a co-defendant. The Principal Sudder Ameen dismissed the suit, finding on the evidence that the will was genuine. In 1869, N. brought this suit for his share as heir of S. against M. The first Court found that the will was a forgery, and gave the plaintiff a decree. On appeal, the Judge held that N.'s claim was barred by the decision in the former suit brought by his brother, and reversed the decision of the first Court.

*Held*, on special appeal, that it was not barred by the findings of the Court in G.'s suit, as N. was no party to that suit, and he could not in any manner have availed himself of a decree in that suit to enforce a claim to his share.

Baboo Mohini Mohan Roy and Iswar Chundra Chuckerbutty for the appellant.

Baboo Srinath Das and Girija Sankar Mazumdar for the respondents.

THE facts of this case are fully stated in the judgment.

NORMAN, J.—This is a very simple case. One Sarup Chandra Mazumdar died on the 30th of Sraban 1272 (August 13th, 1865) leaving two nephews, Nabin

\* Special Appeal, No. 1797 of 1870, from a decree of the Judge of Nuddea, dated the 1st August 1870, reversing a decree of the Moousiff of that district, dated the 30th November 1869.

Chandra Mazumdar and Girish Chandra Mazumdar, as his heirs according to Hindu law. After the death of Sarup Chandra, one Mukta Sundari took possession of that which had been his property, alleging herself to be entitled to the same under a will made by Sarup Chandra in his life-time. In the year 1867, Girish Chandra, as one of the heirs of Sarup Chandra, brought his suit against Mukta Sundari, to obtain possession of one moiety of the estate of Sarup Chandra. He made his brother Nabin Chandra, who appears to have refused to join as a co-plaintiff, a defendant in that suit. The case was tried by the Principal Sudder Ameen, who dismissed the suit, finding on the evidence as it then stood that the will set up by Mukta Sundari was genuine, and that therefore Girish Chandra had no title to the property.

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 NABIN  
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 v.  
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 SUNDARI  
 DEBI.

The present suit was brought on the 22nd June 1869 by Nabin Chandra for his share of the property, as heir of Sarup Chandra, against Mukta Sundari Debi and others as defendants. The first Court went into merits of the case, and found that the will was a forgery, and declared that Nabin Chandra was entitled as heir of Sarup Chandra to that which he claimed in the suit. On appeal, the judge was of opinion that the claim of the plaintiff Nabin Chandra was barred by the decision in the former suit brought by his brother Girish Chandra against Mukta Sundari, in which the validity and genuineness of the alleged will of Sarup Chandra was in issue, and accordingly he reversed the decision of the first Court, and dismissed the suit.

From that decision an appeal has been presented to this Court, in support of which Baboo Mookini Mohan Roy has appeared on the part of the plaintiff. We think that that appeal is well founded. The plaintiff Nabin Chandra was no party to the suit brought by his brother Girish Chandra. He could not in any manner have availed himself of a decree in that suit to enforce a claim to the share which he now claims. He could not have appealed from the decree, and we think it perfectly clear that he is in no way bound by the findings of the Court therein. It would be most unjust if this were otherwise. Suppose there are two brothers interested in equal moieties, as these brothers were, in the property of their ancestor. They see reason to doubt the genuineness of a conveyance set up by some third person to the prejudice of their title. One of the brothers, against the will of the other, who thinks that they have not had time to sift out the facts of the case thoroughly so as to be able to place them before the Court satisfactorily, rushes into Court, and takes his chance of a decision as regards his share. The one who does not join gets no advantage from that suit. He cannot make use of it to save himself from being barred by limitation, or to enforce any rights of his own. He has a perfect right to stand by and watch the conduct of the litigants in that suit, with a view to assert his own rights at the time and in the manner which he shall judge most prudent and convenient to himself.

The decision of the Additional Judge must be reversed, and the case remanded to him: he will probably have very little difficulty in deciding it on the merits.

Costs of this appeal will follow the result.