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well as for the worship of the testator's family Thakoor, Sree Sree Radhagovindjee. Further consideration will be adjourned, and there will be liberty to apply. As it is so desired, the costs of all parties up to and including the trial to be taxed on scale 2 as between solicitor and client will come out of the estate.

Attorneys for the plaintiff: Messrs. *G. C. Chunder & Co.*

Attorney for the defendants: Mr. *R. Rutter.*

PRIVY COUNCIL.

SHEOSAGAR SINGH AND OTHERS (PLAINTIFFS) *v.* SITARAM SINGH (DEFENDANT).

P. C. *
1897.
March 6.

[On appeal from the High Court at Calcutta.]

Res judicata—Civil Procedure Code (Act XIV of 1882), section 13—Proceedings in a prior suit—Fact in issue not heard and "finally decided" therein.

To support the defence of *res judicata* it is not enough that the parties to the suits are the same and that the same matter is in issue. The matter must have been heard and finally decided: section 13 of the Civil Procedure Code.

In 1885 relations of a deceased proprietor, alleging their right to the inheritance, sued for a declaration that they were his next of kin. The defendant set up a title as direct descendant, claiming to be the son of that proprietor's daughter. The first Court decided that this was his true parentage and dismissed the suit. The High Court maintained the dismissal, not upon the merits, but on the grounds that the suit was defective for want of parties, and that a declaratory decree could not be made. In 1888 the same plaintiffs, having purchased the interest of the parties not joined in the previous suit, brought the present suit, with the same object, against the same defendant, whom the Subordinate Judge (not the same officer that disposed of the former suit), now found not to have been the son of the said daughter. A Bench of the High Court (composed of Judges other than those that heard the former appeal) having examined the record of the former suit, reversed the Subordinate Judge's decision. They declined, however, to decide whether or not the latter suit was barred on the ground of *res judicata*. But intimating that they would have affirmed the judgment of the lower Court in the former suit had it, on the merits, come before them, they preferred that judgment to the one before them, and gave effect to this opinion by reversing the latter.

Held, that the question of parentage had not been heard and finally decided in the suit of 1885. The appeal in that suit had put an end to any

* *Present*: LORDS HOBHOUSE, MACNAGHTEN AND MORRIS, and SIR R. COUCH.

finality in the decision of the first Court, and had not led to a decision on the merits. There was, therefore, no *res judicata;* but unless treated as such the judgment in the former suit had little or no bearing on the question as afterwards put in issue in this. That issue had been rightly decided by the Subordinate Judge, on the evidence, and his judgment was accordingly maintained.

APPEAL from a decree (27th July 1891) of the High Court reversing a decree (7th February 1890) of the Subordinate Judge of Gya.

The suit was brought on the 17th July 1888 by three sons of Jawahir Singh, who died before 1882, together with an elder brother now deceased, against the defendant, Sitaram Singh, who was, at the time of this appeal, a minor. He was represented by his guardian, Adit Singh, whom he alleged to be his father, the lawful husband of his mother, Anar Koer, deceased in 1884. The object of the suit, valued at Rs. 6,000, was to obtain a declaratory decree confirming the plaintiffs' title to the possession which they held of a moiety of a revenue-paying *mouza* named Nadaura in Zilla Gya. They claimed to be the nearest collateral relations and heirs, according to the Mitakshara, of Mahipat Singh, brother of their father Jawahir, both having been former owners of Nadaura. Mahipat died on the 28th August 1882, leaving one daughter, Anar Koer, who died on the 29th November 1884, without, as the plaintiffs averred, leaving a son. The defence of Sitaram was that he was her son, born of her marriage with Adit Singh. Thus, claiming Mahipat Singh for his maternal grandfather, his case was that he made a title in priority over the plaintiffs.

Jawahir Singh, the father of the plaintiffs, and Mahipat Singh, the father of Anar Koer, acquired each a half share in *mouza* Nadaura, Mahipat's half share being the subject of the present suit. On the death of Jawahir Singh in July 1879, the plaintiffs, his sons, succeeded to his moiety. Again, on the death of Mahipat in August 1882, they took possession of his moiety, as against their cousin, Anar Koer, who contested their right. The question was whether her father and Jawahir had been joint under the Mitakshara, or divided in estate. On the 15th March 1883, Jawahir's sons obtained an order in their favour for *dakhil kharij* of Mahipat's share, and thenceforth retained possession

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down to this suit. Thereupon, on the 3rd September 1883, Anar Koer sued the present appellants to obtain her father's moiety, which she alleged to have been his separate acquisition. On the 26th January 1884 the Subordinate Judge of Gya decreed in her favour. These appellants appealed to the High Court, and pending that appeal, Anar Koer died on the 28th November 1884. On an application by her opponents for the suit to be treated as abated on her death, the High Court declined to decide on that mere petition whether Anar Koer left a son or not. On the 8th June 1885 these appellants, together with their since deceased brother, Sheobalak, filed their plaint against the present respondent, through his next friend, Adit Singh, asking a declaration that Anar Koer died without issue, male or female. One of the defences to this suit was that two persons alleged to be descended through Anar Koer named Baijnath Singh and Sheosarain should have been made parties. That was the suit referred to in the judgment of the High Court now under appeal, of which suit the record was imparted into the present record. On the 30th November 1885 the first Court dismissed that suit, placing the burden of proof on the plaintiffs and finding no proof that Anar Koer died childless. An appeal from this was dismissed by the High Court on the 22nd March 1886 without any decision as to whether or not Sitaram Singh was the son of Anar Koer, on the ground that Baijnath Singh and Sheosarain Singh, who were equally interested in Mahipat's estate (supposing Anar Koer to have left no son) should have been made parties.

On the 31st May 1888 these appellants purchased their interest for Rs. 1,200, and instituted this suit on the 17th July following. Meantime, in a way not explained, Sitaram's name had been placed on the record of the suit decided in favour of Anar Koer on the 26th January 1884, and liberty to him to execute was granted. He, however, did not, and whether or not he had title by being the son of Anar Koer remained in dispute. The Subordinate Judge decided the issue in favour of the plaintiffs on the 7th February 1890. He disbelieved the evidence for the defendants considering it to have been shown that Anar Koer had passed the age of child-bearing at the date of Sitaram's birth.

On appeal a Divisional Bench of the High Court (PETHERAM, C.J., and BEVERLEY, J.) were of opinion that the conclusion arrived

at by the Subordinate Judge, taking into consideration all the facts and the history of the litigation between the parties, could not be sustained. Consequently, upon the merits of the case and upon the facts, they decreed the appeal and dismissed the suit.

They referred to the former suit between the parties decided on the 22nd March 1886, and the following is that part of the judgment in which their reasons are given :—

"The record and the judgment and the other proceedings were before the Court when it tried this suit ; and when the appeal was argued before us the whole of the paper-book in that case was referred to on both sides. We have come to the conclusion that it is necessary, in the interests of justice, that we should see the whole of the paper-book, and as it has been referred to, we see no reason why we should not deal with it as part of the record, and as being before us, inasmuch as it is clear that everything in it could have been made evidence if the necessary proceedings had been taken.

"Then, with reference to the present appeal, we have gone through the judgment, and we have gone through the evidence in this case very carefully, and if the oral evidence taken there had stood alone, it appears to us that it would have been very difficult for us to interfere with the decision, because the reasoning of the Subordinate Judge upon the evidence, as it appeared there, appears to be quite sound, and the reasons given for the conclusion he came to that Anar Koer, at the time when this person Sitaram was said to have been born, was a woman of such an age as to be past the age of child-bearing, appear to be well founded.

"Then comes the question how the proceedings in the former suit for the same relief bear upon this suit. It must be borne in mind that that suit was brought in the middle of the year 1885. The present suit was brought in the middle of the year 1888. Anar Koer died in the year 1884, and the consequence of that is that the first suit was brought almost immediately after the death of the woman, when all the facts connected with her would be much more easy of proof than three years later ; and in reading those two records, the thing which strikes one most strongly is, not only that in the second case a totally different set of witnesses is called to support the plaintiffs' case from what was called to support it in the first case, but the case is rested on a totally different ground. In the first case, which was brought a year after the death of Anar Koer, a number of witnesses were called who state that this person was not the son of Anar Koer ; they state that at the time of her death she left no son surviving her, though they say she had a number of children, and one of the witnesses, called on behalf of the plaintiffs, says that she had a child fourteen years before her death, which would be almost practically inconsistent with the case relied upon now by the plaintiffs, that at the time of her death Anar Koer was 62 or 63 years old.

That was the evidence which was produced in the first suit. The evidence was simply that she died childless, and upon that evidence the Subordinate

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Judge came to the conclusion that he could not act upon it; and he, thinking that, upon the whole, this person Sitaram had been proved to be the child of Anar Koer, came to the conclusion that the suit must be dismissed, and the suit was dismissed; and reading the evidence in that case, we have come to the conclusion that if that case had stood alone, and the plaintiffs' case had come before us on appeal, it would have been impossible for us to interfere in that case or reverse that judgment. And the same issue was tried here, which was tried by the two Subordinate Judges, one of whom came to one conclusion and another to another conclusion, and practically we have to say which of these two, in this state of things, is right. We think that, having regard to the fact that this was in fact a second trial, and a second trial after an enquiry which had disclosed to the plaintiffs exactly what the defendant's case was, before a decree can be made in favor of the plaintiffs in a suit of this kind, a very different kind of case must be made out, and evidence of a very different kind must be given from that which has been given here.

But, in addition to that, we find here the fact, which I mentioned just now, that not only are a different set of witnesses called by the plaintiffs in the second case from that which they called in the first, but they make a totally different case now from what they made then. They rest the present case on the allegation that at the time this boy is said to have been born this woman was so very old as to have been past the age of child-bearing, no such case having been made by them at the first trial."

They added :—

"Certain points were taken here with reference to the matter being *res judicata*. In the view that we take of it, we do not think it necessary for us to decide that question, and I think it better that we should be understood as not expressing any opinion upon the point one way or the other."

As to costs, the order below went with the rest of the decree; but on this appeal no order was made as to costs.

On the appeal of the plaintiffs—

Mr. *J. D. Mayne* for the appellants argued that even if the record of the suit decided on the 22nd March 1886 had been properly referred to in order to compare the judgment of the Subordinate Judge in the present suit with the judgment of that former date no such variances were to be found, no such differences in the cases put forward appeared, and no such inferences arose from comparison of the evidence, as the judgment now appealed from suggested. The case made by the appellants was the same in both cases, the

evidence in the latter indicating more completely why Sitaram Singh was shown not to be the son of Anar Koer, *viz.*, because her age was too advanced for her to have borne a son, who would at the date of the hearing be so young as he was. The cases set up were identical on both occasions; and if on the first, the appellants did not go into evidence as to her age, it was because the boy had not been seen by them, and was not in Court. Afterwards they made this their principal proof of what had been on both occasions alleged. The High Court had only touched on the question whether the defence of *res judicata* was maintainable, without deciding it. It should have decided that there was no *res judicata.*

In effect the High Court in the judgment of 22nd March 1886 had affirmed a state of things on which the issue, son or no son of Anar Koer, could not be decided on the state of things before the Court, *viz.*, owing to the want of the necessary parties to the suit. Therefore the question in issue was not only left undecided, so that it was not heard and determined, but the judgment was that it could not be heard or determined. Reference was made to *Kali Krishna Tagore* v. *The Secretary of State for India* (1). The decree in favour of this one, or that, of the parties, did not constitute *res judicata* which to be a bar must be a matter finally heard and determined. The evidence supported the appellants' case.

Mr. *C. W. Arathoon*, for the respondent, contended that the present suit was barred by the decison in the former one. As matters stood, the decree of the Subordinate Judge, dated 30th November 1875, was on the record of this present suit, unaltered and unreversed. On this he relied as a final adjudication, and argued that it could not be got rid of by a judgment in reference to it in the present suit. The merits were with the respondent.

Counsel for the appellant was not called upon to reply.

Afterwards on the 6th March 1897 their Lordships' judgment was delivered by

LORD MACNAGHTEN.—The question in this appeal is whether the infant respondent Sitaram Singh is or is not the son of one Anar Koer who died in November or December 1884.

(1) I. L. R., 16 Calc., 173.

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Upon the answer to this queston the title of the appellants to a moiety of certain shares in *mouza* Nadaura depends.

Anar Koer was the wife of Adit Singh, the guardian on the record, and alleged father of Sitaram, and she was the only child and heiress of Mahipat Singh.

Mahipat Singh and a cousin of his, one Jawahir Singh, had purchased the shares in question on their joint account and had registered them in their joint names. Mahipat, who survived Jawahir, died in August 1882. On his death the plaintiffs, who were sons of Jawahir, applied for registration on the ground that the family was joint, and that the succession belonged to them. The Deputy Collector on a summary application decided in their favour. Anar Koer then brought a regular suit to recover her father's moiety. In that suit it was held that the family was not joint, and this decision was confirmed on appeal. But the registration in the Collector's books was not altered; and possession of the whole property has remained with the plaintiffs ever since.

In the present suit, which was commenced in 1888, the plaintiffs asked to have it declared that Sitaram was not the son of Anar Koer or the grandson by the daughter of Mahipat, and that Anar Koer did not leave any child behind. The Subordinate Judge of Gya made a declaration to that effect. The High Court (PETHERAM, C.J., and BEVERLEY, J.) reversed this decision and dismissed the suit. From that reversal the present appeal is brought.

There had been a previous litigation begun in 1885 between the same parties in which the very same issue was raised. The Additional Subordinate Judge of Gya, by whom the case was tried, a different person from the Subordinate Judge in the present suit, attached little or no weight to the oral evidence on the part of the plaintiffs. Holding that the burden of proof lay on the plaintiffs and that they had not discharged it he dismissed the suit. On appeal the learned Judges of the High Court (MITTER and AGNEW, JJ.) affirmed the decree. They did not, however, deal with the real question at issue between the parties. They held that the suit could not be maintained in the absence of certain persons in the same interest as the plaintiffs.

And apart from that objection they were of opinion that under the particular circumstances of the suit before them the Court ought not, in the exercise of its discretion, to make a declaratory decree. Whether the view of the learned Judges on these points was right or wrong the judgment proceeds expressly on the footing that it was "not necessary to come to a decision" on the question of Sitaram's parentage. And so the appeal was dismissed.

The plaintiffs then bought up the interests of the persons not represented in the first suit and commenced fresh proceedings. It was objected that the plaintiffs were precluded from bringing a second suit by the decision in the suit of 1885. In a preliminary judgment the Subordinate Judge disposed of that point without any hesitation. On the 7th of February 1890 he delivered judgment on the main question. He carefully reviewed the evidence and all the circumstances of the case. He was not so much impressed by the oral testimony on the part of the plaintiffs as he was by the way in which the defendant's case had been conducted and by the absence of evidence which, if the defence were an honest one, would, he thought, certainly have been forthcoming. He held that the plaintiffs had made out "a sufficient *primâ facie* case," and that the defendant had altogether failed to meet it.

It is not necessary for their Lordships to do more than express their concurrence with the Subordinate Judge in his view of the question as it was presented to him, because to that extent the learned Judges of the High Court adopt the reasoning and conclusion of the Court below.

"We have," they say, "gone through the evidence in this case very carefully, and if the oral evidence taken there" (that is in the Subordinate Court) "had stood alone, it appears to us that it would have been very difficult for us to interfere with the decision, because the reasoning of the Subordinate Judge upon the evidence as it appeared there appears to be quite sound, and the reasons given for the conclusion he came to that Anar Koer, at the time when this person Sitaram was said to have been born, was a woman of such an age as to be passed the age of child-bearing appear to be well founded."

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The way in which the learned Judges of the High Court disposed of a decision which upon the evidence adduced at the trial they themselves thought well founded was perhaps rather summary. It seems that at the trial the parties had put in evidence the judgment and the decree and such of the depositions in the first suit as they considered material. But the learned Judges on appeal were not satisfied with so meagre an instalment of past history. They held it "necessary in the interests of justice" that they should see the whole of the paper-book in the suit of 1885 and deal with it as part of the record before them. Reading the two records they found that the witnesses on the part of the plaintiffs in the two suits were not the same, and they assumed rather hastily that the plaintiffs were making "a totally different case" from that which they had made originally. Taking the evidence in the first suit by itself they pronounced an opinion that if that suit had come before them on appeal it would have been impossible for them to have reversed the judgment of the Subordinate Judge who had dismissed the plaintiffs' suit "thinking," they said, "that upon the whole this person Sitaram had been proved to be the child of Anar Koer." The same issue, they added, had been tried by two Subordinate Judges; the question was which of the two was right. Under the circumstances they preferred the earlier decision—a decision nearer the time of Anar Koer's death—to the result of a second trial after an inquiry which had, they thought, "disclosed to the plaintiffs exactly what the defendant's case was."

Their Lordships cannot think this mode of dealing with the matter at all satisfactory. The reason why the plaintiffs called a different set of witnesses on the second trial is perhaps not far to seek. In the first case the Subordinate Judge had put aside the evidence of the plaintiffs' witnesses on the ground that they were all either biased by relationship in favour of the plaintiffs or prejudiced against Adit Singh by former disputes. The plaintiffs can hardly be blamed for not choosing to rely a second time upon witnesses thus discredited. Nor is it correct to say that in the second suit the plaintiffs set up "a totally different case." In both suits their case was the same. They averred that Anar Koer died without issue. But when the time of Sitaram's birth was fixed the question was brought within

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a narrower compass. It was enough for the plaintiffs then to prove if they could that at that time Anar Koer was past child-bearing. The case they made originally was established beyond question if they could shew that at the time when the alleged offspring of Anar Koer was born it was impossible for Anar Koer in the course of nature to become a mother.

It is quite true that on the first trial the plaintiffs did not make it part of their case that Anar Koer was past child-bearing in the latter years of her life. Apparently they had no reason to anticipate that so recent a date would be fixed for the birth of the rival heir who has never yet been produced in Court. They seem to have expected an older claimant. When the defence was opened and Adit Singh, who was the first witness for the defendant, pledged himself to the date of Sitaram's birth, the importance of the question became apparent, and thenceforth every witness for the defendant who did not state on examination-in-chief that he was ignorant of Anar Koer's age was cross-examined closely on the subject. No one, however, could tell how old Anar Koer was at her marriage, or how old she was at Mahipat's death. One and all they professed to know nothing whatever about her age. Moreover, it is to be observed, that two of the plaintiffs' witnesses on cross-examination stated that Anar Koer had reached an age which makes child-bearing impossible, or at least very improbable. One said she was 55 at the date of Mahipat's death. Another who gave his age as 48 said she was older than he was. So that the first statement as to Anar Koer's age came from the camp of the plaintiffs before the exact position of the defendant was declared. And if on the first enquiry the plaintiffs gained information useful to them by having the date of Sitaram's birth fixed, the defendant's advisers were made aware of the case they would have to meet in the event of a second trial. And it was an easy case for them to meet if their story was true. However, instead of producing evidence as to Anar Koer's age at Mahipat's death, or as to the birth of a child of her womb, Adit Singh contented himself with the repetition of his former evidence and the allegation that Anar Koer was only his second wife. He had been married before he said to a woman with whom he had lived in wedlock for more than twenty years and he married Anar Koer after

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her death. So much he remembered and swore to positively. But he could remember nothing more about the first wife. He could not even recall her name, and the Subordinate Judge, who saw him under cross-examination, came to the conclusion that that part of his story, at any rate, was a fiction.

It may perhaps be doubted whether the learned Judges of the High Court were right in assuming on the mere perusal of the evidence in the first suit to decide a case which was not before them and on which they could not have heard any argument. However that may be, it is obvious that by the course which they took they gave the effect of a judgment conclusive between the parties to a decision which was superseded on appeal, and which in the opinion of the only tribunal competent to rehear the case ought never to have been pronounced. Indeed, unless the matter of the decision of the Subordinate Judge in the first suit be treated as *res judicata*, it can have little or no bearing on the question at issue. Granted that the first decision of the lower Court was right it by no means follows that the second must be wrong.

It was argued or contended with much persistence before their Lordships that the decision in the first suit might support a plea of *res judicata*. That contention did not commend itself to their Lordships. It met with rather more favour in the High Court, though it did not quite find acceptance there. The learned Judge who delivered the judgment of the Court expressed himself as follows :—

"Certain points were taken here with reference to this matter being *res judicata*. In the view we take of it we do not think it necessary for us to decide that question, and I think it better that we should be understood as not expressing any opinion upon the point one way or another."

Their Lordships are unable to understand what advantage there can be in treating such a point as open to argument, and thus throwing doubt upon the meaning of an enactment which in this part of it at least seems to be expressed in tolerably clear language. To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been "heard and finally decided." If there

had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was no decision ought to have been pronounced on the merits.

Before their Lordships certain judgments in proceedings in execution were appealed to as sufficient to raise or eke out the plea of *res judicata*. But in each case on turning to the judgment it appears that the Court expressly guarded itself against being supposed to decide the question of Sitaram's parentage.

Their Lordships agree with the High Court in thinking that the Subordinate Judge came to a right conclusion upon the evidence and the circumstances of the case before him. They do not, however, think that there was anything in the evidence in the first suit or in the judgment of the Additional Subordinate Judge or in what the learned Judges term "the history of the case" to suggest any doubt as to the propriety of the decision which they overruled.

Their Lordships will therefore humbly advise Her Majesty that the decision of the High Court should be reversed, and the appeal from the decision of Subordinate Judge of Gya dismissed with costs. The respondent will pay the costs of this appeal.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent: Mr. *H. G. Dallimore.*

C. B. *Appeal allowed.*

MARY TUG COMPANY (PLAINTIFFS) *v.* BRITISH INDIA STEAM NAVIGATION COMPANY (DEFENDANTS.)

P. C.*
1897
Feb. 24
and
March 20

[On appeal from a Court of Admiralty held by the Recorder of Rangoon.]

Collision—Damage by a ship under way colliding with another at anchor—Burden of justifying duty of ship at anchor.

Where a ship under way comes into collision with another at anchor in a proper place, and showing, at night, an anchor light, it is obvious that the burden of justifying is heavily cast on the ship under way. At the same

* *Present:* LORDS WATSON and DAVEY, SIR R. COUCH and SIR F. JEUNE.