

Before Mr. Justice Markby and Mr. Justice Ainslie.

1876
Dec. 19.

BRAMMOYE DASSEE ON BEHALF OF BROJO NATH SINGH AND ANOTHER (PLAINTIFFS) v. KRISTO MOHUN MOOKERJEE (DEFENDANT).*

Res Judicata—Act VIII of 1859, ss. 2 & 170—Hindu Widow—Reversioner.

A, a Hindu widow, brought a suit to recover possession of her husband's share of certain joint property. After partially examining some of her witnesses, she cited the defendant as a witness, and on his failure to attend, her suit was dismissed. After the death of the widow, her daughter sued the same defendant on behalf of her two minor sons, as being entitled in reversion to their grandfather's share, to recover the share which was the subject of the former suit: the defendant was summoned as a witness, but failed to attend. *Held*, that the suit was not barred under s. 2, Act VIII of 1859, as being a *res judicata*, until it was shown that the former decree had been obtained after a fair trial of the right, so as to bind not only the widow, but the reversioners. The defendant having failed to attend and give evidence on this point, the Court was justified in giving the plaintiff a decree under s. 170, Act VIII of 1859.

THE facts of this case were shortly these:—A certain property, which originally belonged to three brothers, forming a Hindu joint family, was sold in execution of a decree against two of them, and was purchased by the defendant, who obtained possession. The widow of the third brother thereupon instituted a suit to recover her husband's share in the joint estate. The plaintiff in that suit, after having partially examined one of her witnesses, declined to proceed further with their examination, and cited the defendant as a witness, and on his failure to attend, her suit was dismissed. No appeal was preferred from that order, and the widow died some time after, leaving a daughter, who was the plaintiff in the present suit, and who sued now on behalf of her minor sons, as reversioners to their grandfather's share, to recover the one-third share which was the

* Special Appeal, No. 217 of 1876, against a decree of J. Tweedie, Esq., Officiating Judge of Zilla West Burdwan, dated the 13th of November, 1875, reversing a decree of Baboo Gobind Chund Ghose, Munsif of Bissenpore, dated the 21st of July, 1875.

subject-matter of the former suit. The defendant, among other grounds, pleaded that the suit was barred under s. 2 of Act VIII of 1859. He was cited in this case also as witness on behalf of the plaintiff, but failed to attend. The Munsif decreed the claim, under s. 170 of Act VIII, 1859, holding that the cause of action in the former suit was not heard and determined so as to operate as a bar to the present action. On appeal, the Judge reversed the Munsif's order, holding that the former action was a *res judicata*.

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The plaintiff preferred a special appeal to the High Court.

Baboo *Nilmadhuk Sen* for the appellants.

Baboo *Bhobany Churn Dutt* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—In this case we think the judgment of the first Court was a right judgment, and ought not to have been disturbed by the lower Appellate Court.

It appears that there were three brothers entitled to a certain property. A decree had been obtained against two of the brothers, Shib Prosad and Bhola Nath. Their rights and interests in the property were sold, and the defendant got into possession. The widow of one of the brothers then brought a suit for declaration of her title to one-third share of the property. An issue was raised whether that share was the right and interest of the plaintiff as alleged by her, or of Shib Prosad and Bhola Nath as alleged by the defendant. There were other parties to that suit, but that does not seem to be material. After the death of the widow, the heir of her husband brought the present suit for possession. The decree in the former suit was set up as a bar to the present suit; and an issue was raised whether or no that decree was a bar to the present suit.

The Munsif, who tried the suit, seemed to have had some doubt whether, in point of law, the former decree was a bar to this suit. He also held that there was no proper trial upon the issues raised in the former suit. He then went on to say

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that the plaintiff, in the present suit, had relied mainly upon the evidence of the defendant; and, inasmuch as the defendant having been summoned did not choose to appear in Court, he gave the plaintiff a decree under s. 170 of the Civil Procedure Code.

The District Judge entirely concurs with the Munsif in thinking that this is a proper case to be dealt with under that section; but thinks that section could not be applied to the present case, because in this case the plaintiff cannot show a legal right. What he means by that apparently is, that the legal right which the plaintiff sets up in this case is wholly barred by the decision in the former suit. But the District Judge seems to have overlooked this,—that there was in the present case not an absolute bar such as there would have been, if this were the case of a decree against the person through whom the plaintiff claims. The rule that a decree against the widow binds the reversioner is subject to this qualification, that there has been a fair trial of the right in the former suit. That is laid down in what is commonly called the *Shivagunga case* (1) and in the decision of this Court to the same effect, with which I entirely concur, in the case of *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (2). It was there pointed out that the Privy Council, in a more recent case (3), have said that, while they adhere to the rule that the widow represents the estate of the reversioner for some purposes, it is her duty not only to represent the estate, but to protect it also.

Now, in this case, it is obvious that there were some grounds for looking closely to see what really took place in the former suit, because we find that the former suit was disposed of in a manner which, on the face of it, seems to be not satisfactory. The plaintiff in that suit, after having brought her suit, and after having partially examined one witness, declined to examine any of her other witnesses. She had also cited the defendant;

(1) 9 Moore's I. A., 539.

(2) 15 B. L. R., 142; *vide* p. 159.

(3) *Nogender Chunder Ghose v. Sreemutty Kaminee Dossee*, 11 Moore's I. A., 241.

the same person who was cited to appear in this case. It does not, however, appear whether she made any real attempt to get the defendant into Court, or whether the summons was served upon him. Anyhow he never came into Court, therefore there was good ground for inquiring whether there was a fair trial of the question between the parties in the former suit, and whether the plaintiff performed her duty in protecting, not only her own interest, but the interests of the person who was to take after her death.

Upon that question the evidence of the defendant is most important. Therefore the Court has a perfect right to say that the decree in the former is not a bar to this suit, until there had been some inquiry as to how it was obtained. And the defendant refusing to come in to give his evidence upon that point, the Court would be justified in dealing with the case under s. 170 of Act VIII of 1859. We may assume for the purposes of this judgment that the decree in the former suit would have been a bar to the present suit, if it had been properly obtained; but that would not in any way prevent the Court from inquiring into the question whether it was so or not. Having regard to the circumstances which I have mentioned, the Munsif was right in dealing with the case under s. 170. We think, therefore, that the judgment of the first Court was right and ought to be restored, and that of the lower Appellate Court reversed. The plaintiff will get the costs in this Court and in the lower Appellate Court.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

THE EMPRESS OF INDIA *v.* DILJOUR MISSER.*

Conviction of offence committed before the Penal Code came into operation—Regulation IV of 1797—Act XVII of 1862—Act I of 1868 (General Clauses Consolidation Act), s. 6.

The prisoner was found guilty and sentenced under Regulation IV of 1797 to transportation for life, for a murder committed in 1861, before the Penal

* Criminal Reference, No. 176 of 1876, from an order of A. V. Palmer, Esq., Sessions Judge of Shahabad, dated the 7th August, 1876.

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