1886

ABDUL HAMID v. THE EMPRESS

the convictions as regards X and C will stand. Having regard to the gravity of the offence committed by the appellant we are of opinion that no lighter sentence than the one awarded by the Sessions Judge would meet the ends of justice. We, therefore, sentence the appellant to two years rigorous imprisonment in respect of the forgery of X, and leave the sentence as regards C unaltered.

The result is that the cumulative sentence of three years rigorous imprisonment awarded by the Sessions Judge will stand.

J. V. W.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice O'Kinealy, and Mr. Justice Macpherson.

1886
August 14.

SURENDER NATH PAL CHOWDHRY AND OTHERS (DEFENDANTS) *v.* BROJO NATH PAL CHOWDHRY AND ANOTHER (PLAINTIFFS.)*

Res-judicata—Admissibility in evidence of decree in former case.

The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the same tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent.

Held, (MITTER, J., dissenting) that the decree in the former suit was not a *res judicata* or even admissible as evidence in the present suit.

THIS case was referred to a Full Bench by MCDONELL and GHOSE, JJ., on the 21st April 1886, with the following opinion :—

The plaintiffs, who are the proprietors of 1 anna 8 gundas share of a certain estate, Turf Ranaghat, sued to recover from the defendants Surender Nath Pal Chowdhry and others, their share of the rent said to be due on account of certain tenures

*Full Bench Reference in Appeals from Appellate Decrees No. 1740 and 1741 of 1885, from the decrees of J. Crawford, Esq., Officiating Judge of Zilla Nuddea, dated the 13th May 1885, reversing the decrees of Baboo Jogendra Nath Mitter, Munsiff of Ranaghat, dated 25th October 1884.

held by them by right of purchase. The main defence of the defendants was that the tenures had not been properly described in the plaint, nor were their boundaries and areas given, and hence they were unable to say whether the said tenures were in their possession. The result of this defence was that the plaintiffs were put to proof that the tenures alleged in the plaint were in the defendants' possession. It appears that another co-sharer of the same estate had previously brought a suit against these defendants for the rent of these very tenures, and in that suit the present plaintiffs and the other co-sharers of the estate were made co-defendants. The defence was almost identically the same as is raised in this case, and the Court which had to try the suit found that these defendants were in possession of the tenures, and were liable to pay to the plaintiffs in that suit their share of the rent.

The plaintiffs in this suit, in support of their case, adduced as evidence the judgment in the above case, and the main question that has been discussed before us is, whether the said judgment is evidence or not.

The lower Appellate Court has to a great extent relied upon the said judgment as evidence showing that the defendants are in possession of the tenures in question, and has accordingly given the plaintiffs a decree.

The appellants have contended before us that the said judgment is no evidence whatever under the Evidence Act, and that the result of the Full Bench decision in the case of *Gujju Lal* v. *Fatteh Lal* (1) is to the same effect. It is argued, and it seems to us that this argument is well founded, that what the said Full Bench practically decided was that, except in the case of judgments *in rem*, and judgments relating to matters of public nature, a judgment in order to be evidence must be such as would operate by way of estoppel or *res judicata*.

A recent Full Bench of this Court, in the case of *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2), has ruled in a case where the parties were not arrayed as plaintiff and defendant in a previous suit, but as co-defendants, that the judgment in that suit is not *res judicata*. But the question was not

(1) I. L. R., 6 Calc., 171. (2) I. L. R., 12 Calc., 580.

1886

SURENDER NATH PAL CHOWDHRY v. BROJO NATH PAL CHOWDHRY.

therein raised whether the said judgment, though not *res judicata*, was evidence or not.

If the result of the Full Bench decision in the *case of Gujju Lal* be as the appellants contend, then certainly the judgment adduced in this case should not have been received and acted upon as evidence. But then it appears that the authority of the said Full Bench case has been shaken by the subsequent Privy Council decision in the case of *Run Bahadur Singh* v. *Lucho Koer* (1) and by the decisions of this Court in the case of *Peari Mohun Mukerji* v. *Drobomoyi Dabia* (2), and in the case of *Hira Lal Pal* v. *Hills* (3), In the case before the Privy Council, although the Judicial Committee held that the previous judgment between the parties was not *res judicata*, they still treated such judgment as evidence in the case. It would also appear that the judgment in a certificate case under Act XXVII 1860, and a proceeding before the Magistrate in a recognizance case, were also relied upon as evidence by the Judicial Committee, and this they could not do if the contention raised by the appellants in the present case were correct. In the case of *Peari Mohun Mukerji* v. *Drobomoyi Dabia* (2) a judgment although not *inter partes* was held to be admissible as evidence as showing the nature of the possession of the defendant: and in the last mentioned case, *viz.*, the case of *Hira Lal Pal* v. *Hills* (3) a rent decree of a similar character was used as evidence for the purpose of showing that rent was successfully claimed for the lands which were in the subsequent suit alleged to be lakheraj.

We do not understand why, if the judgments which were dealt with in the two cases of *Peari Mohun Mukerji* and *Hira Lal Pal* could be properly used as evidence for one purpose or another, the judgment adduced in this case could not be used as evidence for the purpose of showing that, in the suit of another co-sharer of the same estate, it was found that the defendants were in possession of the tenures in question.

It seems to us that the question raised before us is of considerable importance, and one which often arises in our Courts; and we therefore think it necessary to refer the following

(1) I. L. R., 11 Calc., 301. (2) I. L. R., 11 Calc., 745.
(3) 11 C. L. R., 528.

question to a Full Bench: Whether under the circumstances stated, the judgment in the previous case is evidence or not.

Baboo *Rash Behary Ghose* and Baboo *Biprodas Mukerji* for the appellants.

Baboo *Srinath Das* and Baboo *Kishori Lal Sircar* for the respondents.

Baboo *Rasbehari Ghose* for the appellants.—The judgment referred to operates either as *res judicata* or is no evidence at all in the present case. It has not the effect of *res judicata*—*Brojo Behari Mitter* v. *Kedar Nath Mazumdar* (1). Therefore it is not admissible as evidence—*Gajju Lall* v. *Fatteh Lall* (2); *Davies* v. *Lowndes* (3) explained.

Baboo *Srinath Dass* for the respondents.—The decision in *Gajju Lall* is contrary to the provisions of the Evidence Act. It is clear from the concluding portion of s. 43 of the Act that judgments, although they may not operate by way of *res judicata*, are admissible in evidence if they are relevant under any other section of the Act. The authority of *Gajju Lall* (2) is narrowed down by subsequent decisions which govern the present case—*Run Bahadur Sing* v. *Lucho Koer* (4); *Peari Mohun Mukerjee* v. *Drobo Moyi Dabia* (5); *Hira Lal Pal* v. *Hills* (6).

Baboo *Kissori Lal Sircar* on the same side.—The present case is distinguishable from *Gajju Lal* (2). Without calling in question the authority of *Gajju Lal*, the judgment here is good evidence as showing the identity of the land in dispute, and is admissible under s. 9 of the Evidence Act. It is also admissible under s. 13, cl. (*b*) of the Act. *See* s. 13, Explanation V of the Civil Procedure Code; the judgment referred to is not only evidence but operates by way of *res judicata*.

Baboo *Rasbehari Ghose* in reply.—*Peari Mohun Mukerji* v. *Drobo Moyi Dabia* (5), and *Hira Lal Pal* v. *Hills* (6), are not applicable.

(1) I. L. R., 12 Calc., 580.
(2) I. L. R., 6 Calc., 171.
(3) 1 Bing. N. C., 606.
(4) I. L. R., 11 Calc., 301.
(5) I. L. R., 11 Calc., 745.
(6) L. R., 11 Calc., 528.

1886

SURENDER NATH PAL CHOWDHRY v. BROJO NATH PAL CHOWDHRY.

The following opinions were delivered by the Full Bench:—

MITTER, J.—I would answer the question referred to us in the affirmative. For the reasons given by me in my judgment in *Gajju Lal* v. *Fatteh Lal* (1) I think that the judgment in the previous case is evidence under s. 9 of the Evidence Act bearing upon the question of the identity of the tenure in respect of which the present suit has been brought with the tenure in respect of which the previous suit was brought.

PETHERAM, C.J.—The plaintiffs claim to be entitled, by purchase, to a 1 anna 8 gundas share of an estate, under which estate they allege that the defendants hold certain tenures; and this suit is brought to recover their share of the rent of the tenures. The question referred to us is whether a decree obtained in a former suit by another sharer in the same estate against the same defendants is admissible in evidence, the object being to prove the defendants' possession of the tenures.

When that decree is examined, all that appears from it (and nothing but the decree itself was put in) is this: that the plaintiff in that suit had acquired also by purchase, a share in the same estate in which the now plaintiffs say they have a share, and he sued defendants for their separate share of the rent of the same tenures now in question, making the now plaintiffs co-defendants; they did not appear. Two defences were raised; first, a denial, or at least a refusal to admit possession of the tenures. This was found against the defendants. The second defence was limitation, on the ground that the person entitled to the particular share of the rent then sued for had not received any rent for more than twelve years. As to this, the Court said, first that there was some evidence of receipt of that share of the rent within twelve years; and, secondly, that however that might be, the defendants being in possession of the tenures were liable for the zemindari rent, and could not therefore repudiate any particular share of it. On this we think it clear that no question of *res judicata* can possibly arise. The test is mutuality. If the former suit had been dismissed, could it have been said that the now plaintiffs were barred? Might they not have said, we had and

(1) 1 Bing. N. C., 606.

have to do with our own shares, we neither knew nor cared about other people's shares: why should we have meddled in their suit?

Apart from *res judicata*, the question whether the decree referred to was admissible in evidence is, we think, concluded by the two Full Bench cases, *Gujju Lal* v. *Fatteh Lal* (1) and *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2).

As the judgment in question was the ground of decision in the lower Appellate Court this appeal must prevail. The decree of that Court will be set aside, and that of the first Court affirmed with costs in all Courts.

K. M. C. *Appeal allowed.*

(1) I. L. R. 6 Calc., 171. (2) I. L. R. 12 Calc. 580.