

Privy Council Appeal No. 141 of 1923.

Oudh Appeal No. 2 of 1923.

Fateh Singh and others - - - - - - *Appellants*

v.

Jagannath Bakhsh Singh and another - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER, 1924.

Present at the Hearing:

LORD SUMNER.

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal by the plaintiffs from concurrent judgments against them given by the Subordinate Judge of Bahraich and affirmed by the Court of the Judicial Commissioner of Oudh.

It is a suit for possession of land, in which the defendants and present respondents raised as a first defence that the matter was *res judicata*, having already been decided between the same parties.

Both Courts being of this opinion and having determined this issue, found it unnecessary to determine any of the other issues and dismissed the suit.

The history of the case is as follows: The present appellants and plaintiffs with others filed a suit in July, 1908, against one Musammat Ram Kunwar, and the present defendant and respondent Jagannath Bakhsh Singh, and one Ganga Bakhsh, now represented by the defendant and respondent Bishunath Singh, in which they

stated that Musammat Ram Kunwar, being a Hindu widow, was in possession of her husband's property for the ordinary Hindu woman's estate, that they (the plaintiffs) and Ganga Bakhsh were the presumptive heirs of her husband, and that she, intending to defeat their succession, had purported to make a deed of gift of the property to Jagannath Bakhsh, her daughter's son; and they claimed that the deed of gift might be declared void and illegal against them.

The defendants in that suit among other defences pleaded that the plaintiffs were not equal in degree with Ganga Bakhsh, but that he was the nearest reversioner and the only person entitled to dispute the deed of gift. To this the plaintiffs replied that if he were the nearer heir—

“even then the plaintiffs are entitled to maintain this suit on account of Ganga Bakhsh Singh's denial and his not joining the suit, owing to his indifference towards the preservation of his rights, having regard to his views expressed in the written statement and on account of his colluding with the defendants 1 and 2; and the defendants 1 and 2 cannot derive any benefit by setting up, a *jus tertii* in favour of Ganga Bakhsh Singh, as alleged by them.”

In this state of the pleadings the widow died.

A suit for a declaration that a gift by a Hindu widow is void as against the reversionary heirs of her husband is one which is contemplated by the Specific Relief Act (Act 1 of 1877, § 42), as is shown by the explanation lettered (e) to that section. But it is established that such a suit is *prima facie* competent only to the nearest prospective reversioner, and that if a more distant relation claims to sue, he can only maintain his suit by showing that the nearer reversioner has colluded with the widow, or for some similar reason.

The rule of law on this subject is stated in the case of *Rani Anund Koer v. The Court of Wards* (8 I.A. 14) in the following terms :—

“Their Lordships are of opinion that though a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. . . .

The right to sue must, in their Lordship's opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct, from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue.”

When the widow died, the question of collusion between Ganga Bakhsh and her became comparatively unimportant. By this event the question of reversionary heirship became settled, and if Ganga Bakhsh was the nearest heir, the plaintiffs could get no title to the property. They might indeed have brought their suit for declaration to a hearing for the purpose of determining in that suit the question of heirship as between them and Ganga Bakhsh, or to establish their averment of collusion in order

to get the costs of the suit. But now that the widow was dead the real matter was to get possession; and they accordingly endeavoured to turn their suit into one for possession.

It seemed, however, that if according to the ordinary Hindu law of descent, Ganga Bakhsh was the heir, to the exclusion of the plaintiffs, that they must fail in such a suit. They were minded accordingly to make a new case, namely, that by a family custom they were equal in degree with Ganga Bakhsh and entitled as such to maintain a suit for possession.

Accordingly, they made an application in the suit setting forth the death of the widow and claiming that they had become entitled to institute a suit for possession, and that in order to show their right it had become necessary to mention certain additional averments of fact in the plaint, the additional averments being allegations of the family custom and a statement as to the death of the widow, and the new relief claimed being a decree for possession of a ten-anna share in the property.

This application to amend came on for hearing on the 15th March, 1909, and the learned Judge rejected the application to be allowed to add the amendments averring the family custom, holding that it was an attempt to introduce a new case. When he had intimated that this was his opinion, the question remained whether the plaintiffs should be allowed to add their prayer for possession, and whether it was worth while continuing the suit. It was admitted by the plaintiffs' counsel that, apart from custom, they were one degree more remote than Ganga Bakhsh, and that if they could not make the case of a family custom, their suit must fail; and the learned Judge thereupon dismissed it with costs; and from this decision there was no appeal. He did, however, in the course of his judgment use the following expressions, which will need consideration :—

“The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession.”

The plaintiffs took no further steps till the 5th February, 1921. In the meantime one of the present defendants brought an action against the other; and the parties compromised on the terms of each taking one-half.

In the present suit brought on the 5th February, 1924, the plaintiffs are claiming possession of one-half of the property, founding their title on family custom. To this the defendants, besides denying the custom and asserting the validity of the widow's gift, have pleaded that the suit was barred by section 11 of the Code of Civil Procedure as raising a question which had already been heard and decided. Both Courts, as already stated, took this view, and without going into other portions of the case, dismissed the suit. In their Lordships' opinion their decisions were right.

The language of the section in question is as follows :—

“ No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

With this must be read :—

“ Explanation IV. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

When the plaintiffs brought their first suit, they had to show their title to impeach the widow's gift. For this purpose they had to show either that they were some at least of the nearest reversionary heirs, or that the only nearer reversionary heir had colluded with the widow. In their plaint they did not rely on collusion, which they only introduced in their replication. Taking, however, that view of the pleadings which is most favourable to them and treating them as relying equally on both grounds of claim, it is now clear that they can only make out a claim to be some of the next reversioners on the footing of the family custom, and that the allegation of that custom therefore was an allegation which “might and ought to have been made” within the meaning of Explanation 4.

Or, to put it in another way. One of the alternative cases on which they were basing their title to sue was their nearness of kin, and to prove their nearness of kin it was essential to aver the family custom. They claimed as next heirs, and their claim was dismissed. They cannot fight it over again.

But, as the Judges in the Court of the Judicial Commissioner have observed, some complication was introduced by the language of the Judge who tried the first case and by his expressing himself as if he had power to give leave to bring a fresh suit. It was contended on behalf of the plaintiffs that in so expressing himself he was purporting to exercise the powers given to the Court by Order 23, which allows the Court in certain cases to grant the plaintiff permission to withdraw from a suit with liberty to issue a fresh suit, in which case the bar against a fresh suit which is otherwise imposed on a plaintiff who abandons his first suit is removed.

The same point was raised at their Lordships' bar, but their Lordships agree with the Court of the Judicial Commissioner that it is not a good one. There was no application for leave to withdraw the suit, nor was it withdrawn : it was dismissed. And the power of the learned Judge ceased upon this dismissal. It may have been unfortunate for the plaintiffs that the learned Judge thought that he had a power which he did not possess, but happily, as the Judges on the appeal observed, it is improbable

that there was substance in the claim which they have been prevented from further prosecuting.

In passing it may be observed that if the learned Judge thought that he was exercising power under Order 23, he must also have thought that the subject matter of any future suit would be the same subject matter as that of the suit which he dismissed. This confirms the view which the Courts below and their Lordships have taken.

Several authorities upon the construction of section 11 of the Code of Civil Procedure were cited, which it was suggested put a construction on Explanation 4 which was favourable to the plaintiffs. They have been considered by their Lordships; but, in fact, they have no bearing upon the present case.

Perhaps the one which requires the most careful examination is that of *Doorga Persad Singh v. Doorga Konwari* (5 I.A., page 149); because in that case their Lordships intimated that the plaintiff would not be barred from setting up a family custom of descent upon the death of a widow by reason of his having in a previous suit in which he was a defendant averred the family custom as entitling him to oust the widow during her life and having failed on this point. But they held that as to the immediate point then under consideration he was barred, and after citing a very strong passage from 11 Moore's I.A., page 73, they proceeded to express themselves as follows:

“ If the defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time.”

In *Zemindar of Pittapuram v. Proprietors of the Mutta of Kolanka* (5 I.A., page 206) the plaintiff had brought a previous suit which had failed against his grandfather's widow and certain other defendants; and some of the defendants to the second suit might have been held to be successors in title to some of the defendants in the previous suit. But in the view which the Judicial Committee took of the facts, there were three properties concerned in the first suit, (1), (2) and (3), and numbers (1) and (2) were not in question in the second suit; while as regards number (3) no case was made in the first suit affecting the defendants in the second suit, and the only way in which number (3) came into the first suit was because the plaintiffs at that time sought to restrain the widow (since dead and not a party to the second suit) from waste. This being so, nothing had been decided in the first suit which affected the question of the title of the plaintiff to property number (3), and as to it, there was held to be no case of *res judicata*.

Mussummat Chand Kour v. Partab Singh (15 I.A., page 156) was a suit by reversionary heirs alleging the intention of a widow to injure their right by selling or mortgaging the property, which failed, and then a second suit to set aside an actual deed of gift. This second suit was upon the construction

of the earlier Act then in force, held to be a suit upon "a different and subsequent cause of action to that relied upon in the first suit." It may be added that in that case the failure of the first suit was caused by the non-appearance of the plaintiff at the trial, and inasmuch as the first suit might have failed in either of two respects (either the plaintiff might have no title or the widow might not have been threatening to sell or mortgage), a mere dismissal for non-appearance could not be held to determine that the plaintiff had failed for want of title.

Lastly, their Lordships would refer to the case of *Kailash Mondul v. Baroda Sundari Dasi* (I.L.R. 24 Calcutta, page 711), decided in the High Court at Calcutta. In that case the plaintiff had sued the defendant for rent, and the defendant had pleaded abatement and had adduced no evidence in support of his plea, so that the plaintiff recovered judgment. Many years after the plaintiff sued the defendant for the rent subsequently accruing, and the defendant sought to raise various defences. It was contended, and so held in the lower Courts, that the matter was *res judicata*, and concluded in favour of the plaintiff. But the High Court held that it did not follow because rent was due from the defendant in one year that it was necessarily due in later years; and this seems obvious, for the position of either of the parties might have changed. Maclean C.J. said that it might be that on looking further into the matter some particular issue might be found to have been previously decided, and then the principle of *res judicata* might apply; but that as the matter stood it did not necessarily so appear. Banerjee J., it is true, made some observations upon those words "heard and finally decided," which appeared in the old Act and are in the present Code; and to these observations, couched in language not so careful as it might have been, undue prominence has been given by the reporter in the summary of the case which appears in the head note. But in the actual decision there is no conflict with the established authorities.

The other cases which were brought by the learned Counsel for the appellants before their Lordships have, in their Lordships' judgment, no bearing upon the present decision. Upon the whole, therefore, their Lordships agree with the Courts below that this is a case of *res judicata*, and that the defence succeeded.

Their Lordships will therefore humbly recommend His Majesty that this appeal should be dismissed with costs; but the respondents must have only one set of costs between them.

In the Privy Council.

FATEH SINGH AND OTHERS

v.

JAGANNATH BAKHSH SINGH AND
ANOTHER.

DELIVERED BY LORD PHILLIMORE.

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