Privy Council Appeal No. 21 *of* 1929.
Bengal Appeal No. 9 *of* 1927.

Kalipada De and others - - - - - - *Appellants*

v.

Dwijapada Das and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH NOVEMBER, 1929.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD DARLING.
LORD TOMLIN.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*Delivered by* LORD DARLING.]

The question in this appeal is as to the right of inheritance to one Nistarini who is entitled under her father's will to the property in suit. She died childless and intestate in November, 1909. There were various claims to her estate, but this appeal is concerned only with the claim of the first respondent, Dwijapada, on the one hand, and two brothers, Gokal and Banwari (through whom the appellants claim) on the other.

On the death of Nistarini, applications were made by both parties to the District Court for the grant of letters of administration to her estate under Act V of 1881. The proceedings being contentious were tried as a suit by the Subordinate Judge to whom the case was transferred under the provisions of Bengal Act XII of 1887. The principal, if not the only, question for his decision was whether Dwijapada was the nearest heir of Nistarini, this depending upon a pure question of fact, namely, whether Dwijapada's mother was the sister of Nistarini's husband. This issue was formally raised and determined by the Subordinate Judge in favour of the first respondent Dwijapada, and on the

20th August 1912 the Subordinate Judge ordered that letters of administration to Nistarini's estate should issue to him.

There was an appeal to the High Court and the decision of the Subordinate Judge was affirmed. Letters of administration were granted to the first respondent and he obtained possession of the property. No appeal was made to His Majesty in Council, as it could hardly be doubted that upon the concurrent finding of fact of the two Indian Courts such an appeal would have been hopeless. The other claimants, Gokal and Banwari, apparently acquiesced in the finality of this adjudication and took no further steps in the matter. After their deaths their heirs seem to have sold their alleged shares in the property to the present appellants, who, in November, 1921, on the eve of limitation, instituted the somewhat speculative suit out of which this appeal has arisen. They prayed for a declaration that Dwijapada, the first respondent, was not the sister's son of Nistarini's husband, and the establishment of their title through Gokal and Banwari, with possession and mesne profits.

The first defence raised was that the suit was *res judicata* by reason of the previous decision, but the trial Judge, relying mainly upon a decision of the Calcutta High Court in 15 Calcutta, W.N., p. 1021, held against this contention, and, proceeding to try the suit upon its merits, came to the conclusion that Dwijapada was not in the relationship to Nistarini which had been found in the former proceedings, and consequently was not her heir, but that Gokal and Banwari were entitled to the property. Dwijapada appealed, and the High Court reversed the decision of the trial Judge upon both questions. They held that the appellant's suit was barred by the rule of *res judicata*, and they were also satisfied upon the evidence that the first respondent was the heir of Nistarini.

The unsuccessful plaintiffs have now appealed to His Majesty in Council, and the first matter for consideration is that of *res judicata*.

The question as to what is to be considered to be *res judicata* is dealt with by Section 11 of the Code of Civil Procedure, 1908. In that section are given many examples of circumstances in which the rule concerning *res judicata* applies ; but it has often been explained by this Board that the terms of Section 11 are not to be regarded as exhaustive. In the case of *Ram Kirpal Shukul* v. *Rup Kuari*, 11 I.A. 37, this is made clear, especially in these words of Sir Barnes Peacock (at p. 41), " The binding force of such a judgment in such a case as the present depends not upon Section 13 of Act 10 of 1877 " (now replaced by Section 11 of The Code of Civil Procedure, 1908), " but upon general principles of law. If it were not binding there would be no end to litigation." This decision, and the authority of the very words used by Sir Barnes Peacock, are confirmed and enhanced by the language of Lord Buckmaster in announcing the conclusion of this Board in *Hook* v. *Administrator-General of Bengal*, 48 I.A.

187, at page 194 ; and further at page 138 of 49 I.A. in the case of *Ramachandra Rao* v. *Ramachandra Rao.*

Several cases decided in Indian Courts were cited in the course of this appeal, as some of them had been to the High Court from whom this appeal is brought. That Court pointed out the fallibility, in the matter of law, of many of those cases, as already demonstrated by decisions of this Board. It appears to their Lordships worth while to repeat what was said by Sir Lawrence Jenkins in delivering the judgment of the Board in *Sheoparsan Singh and others* v. *Ramnandan Singh*, 43 I.A. 91, at p. 98. "In view of the arguments addressed to them, their Lordships desire to emphasise that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time. 'It hath been well said,' declared Lord Coke, '*interest reipublicæ ut sit finis litium*—otherwise, great oppression might be done under colour and pretence of law' (6 Coke, 9a). Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus : 'If a person, though defeated at law, sue again, he should be answered, 'You were defeated formerly.' This is called the plea of former judgment.' (See the Mitakshara (Vyavahara), bk. II, ch. I, edited by J. R. Gharpure, p. 14, and the Mayuka, ch. I, s. 1, p. 11, of Mandlik's edition.) And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

For these reasons their Lordships have no hesitation in holding that the conclusion arrived at by the High Court was right.

It has been suggested, however, that even if the suit is barred against the appellants claiming through Gokal, there is no similar bar against those who claim through Banwari, inasmuch as (so it is said) he was not a party to the original trial. This allegation is based upon the fact that his name does not appear on the face of the order passed by the Subordinate Judge on the 20th August, 1912, but it is clear from the applications made by him in the course of the proceedings that he was a party thereto and that the omission of his name from the formal order was merely an oversight. In the decree of the High Court in appeal from the Subordinate Judge he is properly named as a party.

Their Lordships therefore agree with the judgment of the High Court in the present case that this contention must fail.

They will therefore humbly advise His Majesty that this appeal should be dismissed.

As the respondents have not appeared, there will be no order as to costs.

In the Privy Council.

KALIPADA DE AND OTHERS

v.

DWIJAPADA DAS AND OTHERS

DELIVERED BY LORD DARLING.

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