Privy Council Appeal No. 15 *of* 1928.
Allahabad Appeal No. 12 *of* 1925.

Musammat Munni Bibi, since deceased (now represented by Madho Prasad and others), and another - - - - *Appellants*

v.

Tirloki Nath and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH FEBRUARY, 1931.

Present at the Hearing:
LORD TOMLIN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The property in dispute in this appeal is a house in Agra, said to be worth Rs. 20,000. It has provided the parties with litigation for over forty years. It originally belonged to one Joti Pershad. On the 27th January, 1864, he executed a deed by which he purported to give it to his wife, Bibi Mukandi, but it is said that the gift was not perfected by possession.

Joti Pershad died in 1870, and his two sons Bishamber Nath and Amar Nath succeeded to his property. If the house had been effectively transferred to Mukandi the sons clearly took no interest in it; but when they came to a partition in 1881 it was allotted to Amar Nath, who lived in it till his death in 1884. Thereafter his widow, Hira Dei, continued to live in it till her death in April, 1907, when, if it was the property of Amar Nath, it devolved on his daughter, the appellant, Munni Bibi.

Mukandi died in 1891, and if the deed of gift was effective the house then passed as her *stridhan* to her two daughters,

Ratan Dei and Kashi Dei. Ratan died in 1894 childless, and Kashi in 1912; and assuming the title to have been with Mukandi, the house would now be the property of the first three respondents, who are descendants of Kashi.

It is between these conflicting claims that their Lordships are called upon to decide.

On the death of Hira, the widow of Amar Nath, the house was taken possession of by Gocal Nath, the son of Kashi, in the absence of the appellant, who was living with her husband in Patna, and she now sues for possession.

The respondents' case is that the house was from the date of the deed of gift Mukandi's property, and that the occupation by Amar Nath and Hira was merely permissive. Mukandi was not a party to the partition of 1881, but under an award of arbitrators by which it was effected certain benefits were conferred upon her in the shape of a monthly allowance of Rs. 250 and the transfer of another house at Muttra. Certain villages were also allotted to her daughters Ratan and Hira. The appellant contends that Mukandi had full knowledge of the award, and accepted the provision so made for her and her daughters, and that she should therefore be taken to have acquiesced in the allotment of the Agra house to Amar Nath.

Whether this was what really happened or not is, of course, in dispute, but both Amar Nath and Hira seem to have regarded themselves as the owners of the house. They mortgaged it on various occasions, but when the mortgagees attempted to enforce their security they were met by claims based on the deed of gift.

At Amar Nath's death in 1884 his property, which appears to have been considerable, was heavily encumbered, and it seemed likely that everything would be swallowed up by his creditors. A suit had been instituted against him in 1883 upon a mortgage which included the Agra house. This mortgage was attested by the husband and eldest son of Kashi, who also identified the mortgagors before the Registrar, and it is accordingly suggested that they could not have been ignorant of the transaction. On Amar Nath's death the suit was continued against Hira, and in June, 1889, a decree for sale was passed. In March, 1890, Mukandi intervened, claiming the house under the deed of gift, and her objection was allowed, but Hira still remained in occupation; the mortgage decree was apparently satisfied out of other assets.

Between 1885 and 1893 a number of mortgages were executed by Hira in which the house was included. In November, 1893, when it was evident that the situation was becoming critical, Ratan, the eldest daughter of Mukandi, who was then dead, instituted a suit against Hira and some of her mortgagees, claiming possession of the house and (in effect) a declaration that it was not affected by the mortgages. Kashi was at first made a defendant, on the allegation that she had refused to join

in suit, but on Ratan's death, pending the trial, she was substituted as plaintiff. Hira put in a written statement setting up her title as Amar Nath's widow, but at the hearing gave evidence in favour of Kashi Dei, and no reference was made to the award or to Mukandi's acquiescence. The result was that a decree was made in favour of the plaintiff.

Satisfied apparently with this assertion of her rights, Kashi left Hira in occupation as before, and in subsequent legal proceedings it was (not unnaturally, perhaps) suggested that this suit was collusive, and a mere device to save the house from the creditors of Amar Nath and Hira.

In October, 1896, Kashi, by deed, dedicated the house to the god Shri Joti Nath Mahadeo, and appointed Kanno Dei, the wife of her brother Bisham Dei Nath, *mutwalli* of it, but still no change was made in Hira's occupation, which continued, uninterruptedly, for another ten years.

In 1908, shortly after the death of Hira, one Narayan Singh, as the assignee of an old but apparently good decree against Amar Nath, attached the house in execution. Kanno, as *mutwalli* under the deed of 1896, objected to the attachment, and her objection was allowed. Thereupon Narayan Singh instituted a suit, No. 337 of 1909, praying for a declaration of his right to attach and sell the house in execution of his decree. He joined as defendants Kanno and Kashi, and the present appellant Munni. His suit was dismissed in the first Court, but decreed on appeal, and his right to realize his decree by sale of the house was affirmed. The decree of the Appeal Court was dated the 18th January, 1912. By this time Kanno was dead, and Kashi seems to have died shortly afterwards. Thereupon her son, Gocal Nath, who would, if the house had been the property of Mukandi, have succeeded to it on Kashi's death, paid off Narayan Singh's decree and retained possession of the house. Munni's suit was instituted on the 11th March, 1919, shortly before the expiry of the 12 years' period of limitation, and it comes before the Board after a further lapse of 11 years.

Having regard to the tangle of decisions referred to above, it is only to be expected that the plea of *res judicata* should find a prominent place in the story. In the 1909 suit it was put forward by the defendant Kashi, relying on the decision of 1893, but was decided against her with the result already stated. The same plea is put forward by the respondents in the present case. The appellant, on the other hand, contends that the decision in the 1909 suit is conclusive against the respondents.

The suit out of which the present appeal arises was first tried by the Subordinate Judge of Agra. He delivered his judgment on the 12th March, 1920, and decreed the suit in the appellant's favour. He held that the question of title between Kashi and the appellant was *res judicata* by reason of the decision in the 1909 suit, and that it having been obtained " upon fair trial

and after full contest," the respondents were bound. This decree was apparently set aside by the High Court and the suit ordered to be retried *de novo*, though the record before their Lordships does not disclose the reasons. On the retrial the contrary view was taken on the question of *res judicata*, but the same ultimate result was arrived at by the new Subordinate Judge on the question of title, and the appellant again succeeded. The respondents appealed, and the learned Judges of the High Court, while agreeing with the retrial judgment as to *res judicata*, came to a different conclusion as to title, holding that the deed of gift of 1864 was effective, and that the house was the property of the respondents.

The *ratio decidendi* of the two later pronouncements on the question of *res judicata* was that there had been in the 1909 suit no trial of the question of title as between Kashi and the present appellant, who were ranged as co-defendants. Before their Lordships the appellant contends that these decisions were wrong, and that the true view was that taken in the first judgment of the 12th March, 1920.

It is, their Lordships think, clear that if this contention is correct, it is decisive of the present appeal, and they will now proceed to its consideration.

The doctrine of *res judicata* finds a place in S. 11 of the Civil Procedure Code of 1908, but it has been held by this Board on many occasions that the statement of it there is not exhaustive ; the latest recognition of this is to be found in *Kalipada De* v. *Dwijapada Das*, 57, I.A. 24. For the general principles upon which the doctrine should be applied, it is legitimate to refer to decisions in this country, see *Soorjamonee Dayee* v. *Suddanund Mohapatter* I.A. Suppl. 212 ; *Krishna Behari Roy* v. *Brojeswari Chowdranee*, 2 I.A. 283 ; *Rajah Run Bahadur Singh* v. *Mussumat Lachoo Koer*, 12, I.A. 23. That there may be *res judicata* as between co-defendants has been recognised by the English Courts and by a long course of Indian decisions. The conditions under which this branch of the doctrine should be applied are thus stated by Wigram V. C., in *Cottingham* v. *Earl of Shrewsbury*, 3, Hare, 627 at 638. " If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound ; but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." This statement of the law has been accepted and followed in many Indian cases : see *Ahmad Ali* v. *Najabat Khan*, I.L.R. 18 All., 65 ; *Ramchandra Narayan* v. *Narayan Mahadev*, I.L.R., 11 Bombay, 216 ; *Magniram* v. *Mehdi Hossein Khan*, I.L.R., 31, Calc., 95. It is, in their Lordships' opinion, in accord with the provisions of S. 11 of the Civil Procedure Code, and they adopt it as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between

co-defendants. In such a case, therefore, three conditions are requisite : (1) There must be a conflict of interest between the defendants concerned ; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; and (3) the question between the defendants must have been finally decided.

Their Lordships are of opinion that these conditions are established in the present case. There was clearly a conflict of interests between the appellant as the daughter and heir of Amar Nath, and Kashi, as the heir of Mukandi. It was only if the house belonged to Amar Nath that the plaintiff's suit could succeed ; if it belonged to Mukandi he must fail. It was, therefore, necessary to decide between the conflicting claims of the defendants. The principal issue for decision in the 1909 suit was framed in the following terms :—" 4. Was Babu Amarnath owner of the disputed house ? Is the house liable to be sold in execution of [the plaintiff's decree] ? "

This issue was found against the plaintiff by the trial Judge, and " as the result " of this finding his suit was dismissed. It was decided in his favour by the High Court, and his suit was decreed. It is not suggested for the respondents that this determination was not final.

It is true that the appellant did not enter an appearance in the suit, and it is also said that she was not a necessary party to it ; but their Lordships do not regard either of these factors as really material. The appellant was at all events a proper party to the suit and had the right to be heard if she so desired. If she chose to stand by and let the plaintiff fight her battle, it could not affect her legal position. The test of mutuality is often a convenient one in questions of *res judicata*. If the decision had gone the other way the appellant could hardly have claimed that because she did not choose to appear she was not bound by it, and so have compelled Kashi to litigate the matter over again ; and if the appellant would have been bound, so must Kashi be. There is, however, evidence on the record of the present suit, emanating from one of the principal witnesses for the respondents that the appellant did, in fact, support the plaintiff in the 1909 suit.

Their Lordships must, therefore, hold that the title to the house as between the appellant and Kashi is *res judicata* in the present suit by reason of the 1909 decision. This must equally bind the respondents unless it is established that it was procured by fraud or collusion. " Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is in the absence of fraud or collusion, binding on the reversionary heir," *Vaithialinga Mudaliar* v. *Shrirangath Anni*, 52, I.A., 322 at 337. There is no suggestion in the present case that the 1909 suit was not fully fought by Kashi, nor is any allegation of fraud or collusion made against her in connection with her defence. Their Lordships therefore agree with the first Subordinate Judge that the decree passed by the

High Court in Suit 337 of 1909 binds the respondents, and is conclusive of the appellant's title as against them to the house in dispute.

Their Lordships greatly regret that the conclusion to which they have come will not end the litigation between the parties. In their written statement the respondents claimed that the appellant could not in any event be entitled to recover possession of the disputed house without repaying to them a sum put at the figure of Rs. 7,200 and interest, which they alleged Gocal Nath had paid to free the property from Narayan Singh's decree, and the twelfth issue raised at the hearing was directed to this defence. Both the Subordinate Judges by whom the suit was tried held that this was a gratuitous payment, and refused the claim. The question was, however, raised again by the thirteenth ground of their memorandum of appeal, but was not dealt with by the learned Judges of the High Court, no doubt because in the view they took upon the main issues in the case this question did not arise.

It has been agreed before their Lordships that the necessary materials for the decision of this one outstanding point are not before them, and that if it should become material to deal with it the case must go back to the High Court. This contingency now arises, and their Lordships have no choice but to remit the appeal to the High Court for consideration of this issue upon such materials as are available.

For the reasons given their Lordships are of opinion that this appeal should be allowed, that the decree of the High Court should be set aside, that it should be declared that the appellant's title to the Agra house, the subject of the suit, is established, but without prejudice to such claim, if any, as the respondents may have by reason of the alleged payment by Gocal Nath to Narayan Singh in satisfaction of his claim against Amar Nath's estate, and that this appeal should be remitted to the High Court for their decision upon the twelfth issue and the thirteenth ground of appeal; and their Lordships will humbly advise His Majesty accordingly. The defendant-respondents will pay the costs of the appeal to the High Court and before this Board. The order for costs made on the re-trial by the Subordinate Judge dated the 8th February, 1922, will stand, subject to any variation that may be thought necessary by the High Court consequent upon the decision of the issue remitted to it. Any further costs incurred in India will be dealt with by the High Court.

In the Privy Council.

MUSSAMMAT MUNNI BIBI, SINCE DECEASED (NOW REPRESENTED BY MADHO PRASAD AND OTHERS), AND ANOTHER

v.

TIRLOKI NATH AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1931.