*Judgment of the Lords of the Judicial Committee of the Privy Council on the two consolidated Appeals of Maharaja Radha Parshad Singh* v. *Lal Sahab Rai and others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered* 12*th July* 1890.

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Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The suit in which these consolidated appeals are taken was instituted by Lal Sahab Rai and others, the Respondents, before the Subordinate Judge of Ghazipur in March 1882, for the purpose of obtaining relief against the attachment and sale, at the instance of the Maharaja Radha Pershad Singh, the Appellant, of certain shares of immoveable estate in taluka Narhi and elsewhere, in satisfaction of a judgment debt alleged to be due from their ancestor Jhanguri Rai. The Respondents are the six sons of Jaipargash, the only son of Jhanguri, who was one of the five sons of Achraj Rai, a pattidar of Narhi; and the shares sold in execution by the Appellant were the ancestral property of the Respondents, being one fifth of the interest which belonged to their great-grandfather Achraj Rai.

In order to appreciate the relative position of the litigants and the merits of the controversy

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raised by these appeals, it is necessary to revert to the legal proceedings in which the decrees were obtained which formed the warrant for the attachment and sale against which relief is sought.

Taluk Majharya, now belonging to the Appellant, and taluk Narhi, already mentioned, are situated on opposite banks of the Ganges, Majharya being on the Shahabad, and Narhi on the Ghazipur side of the river. Disputes arose between the proprietors of these two taluks with respect to the ownership of 1,589 bighas of alluvial land which had been deposited by the action of the river on its Shahabad side; the proprietors of Narhi, who appear to have been in possession, alleging that the disputed land was a re-formation upon a denuded area which originally formed part of their taluk. Consequently the Maharaja Buksh Singh, father and immediate predecessor of the Appellant, brought, in 1855, an action against 264 Defendants, pattidars of Narhi, before the Civil Court of Ghazipur, for recovery of the disputed bighas, and for mesne profits. The judicial record of that action perished in the Mutiny, but copies of the written statement lodged for 57 pattidars who appeared to defend, of their petition for leave to file documents, and of the ultimate decree passed by the Civil Judge of Ghazipur, have been produced and admitted without objection in this suit.

The decree, which is dated the 14th April 1856, assigned the disputed land to the Maharaja, and fixed its boundaries; and also found that he was "entitled to mesne profits from the date "of the Deputy Collector's order until he re-"covers possession." An appeal was taken by some of the defendants to the Sudder Court, who, on the 29th November 1859, varied the boundaries fixed by the Subordinate Judge

favourably to the defendants, and directed " that mesne profits be adjusted accordingly." The Maharaja presented a petition for review, upon which the Sudder Court, on the 7th April 1860, modified its previous decision with respect to boundaries, in his favour. An appeal was then taken by the defendants to this Board, which was dismissed on the 31st March 1870 for want of prosecution. It is unnecessary to notice farther these proceedings by way of appeal, because the decrees pronounced in them had reference merely to the extent of the land which the Maharaja was entitled to recover, and did not disturb the general finding of the Subordinate Judge of Ghazipur in regard to mesne profits.

It having been judicially determined that the disputed land formed part of taluk Majharya, the action was, after the dismissal of the appeal to this Board, transferred to the Court of Shahabad, the district in which that taluk is situated. In 1874 the Maharaja was put in possession of the land in pursuance of the decree of the Sudder Court; but the question of mesne profits was not finally disposed of until 1877. On the 1st March 1877 the Subordinate Judge issued an order, which has become final, fixing the amount of mesne profits and costs due to the Appellant as successor of the Maharaja at Rs. 10,69,667, for which he gave decree jointly against all the parties whose names then appeared as defendants to the action.

In June 1878, an order issued from the Shahabad Court for attachment of the interests of the judgment debtors in mehal Umarpur, in satisfaction of these mesne profits and costs of suit. In the course of the proceedings the Respondents applied to have a 2 ganda 2 kauri $2\frac{1}{4}$ dant share, which they alleged to belong to them, struck out of the inventory; but their objection was overruled, and the property sold

in execution. The Respondents then brought a regular suit for relief against the attachment and sale, in which they alleged that their share of the mehal was ancestral property, and that neither they nor their ancestors were judgment debtors in the decree executed, or in any way liable under it. The suit was resisted by the Appellant, on the grounds that the Respondents had no interest in Umarpur, and that they were not the representatives of Jhanguri and Jaipargash. After adjustment of issues, the action was dismissed with costs, on the 21st July 1881, because of the Respondents' failure to adduce evidence in support of their allegations; and the Respondents took no steps to set aside that order, which has consequently become final. It would hardly have been necessary to refer to these proceedings in execution, had it not been for the fact that the Appellant relies upon them as constituting *res judicata* in the present suit.

On the 1st March 1881, the Appellant instituted proceedings for execution in the Court of Ghazipur against property of the judgment debtors situated in that district, stating in his application (1) the names of the judgment debtors, and (2) the names of those against whom his decree was sought to be executed. Amongst the former there occurs the name of "Chakauri Rai," which is synonymous with "Jhanguri Rai;" and amongst the latter the names of all the Respondents, who are described as "sons of Jaipargash Rai, deceased, heirs of Chakauri Rai, grandson of Achraj Rai." So that in these proceedings the Appellant rightly attributed to the Respondents the character of heirs of Jhanguri and Jaipargash, which he denied that they possessed in his previous execution suit. The Respondents lodged objections, praying for release of their interest, on the ground that it belonged to them, "and they were in possession

" thereof, and the judgment debtors had no " concern with it;" but these objections were repelled by the Subordinate Judge of Ghazipur, on the 10th March 1881, in respect of their having been once before raised by the same persons in the Court of the Sub-Judge of Shahabad, and there disallowed.

On the 3rd March 1882 the Respondents brought the present suit, in which there has been an unusual amount of litigation. Their cause of action is thus stated in the plaint:— " The judgment debtors have no connection " or concern with this property, nor are the " Plaintiffs or their ancestors debtors under the " decree under execution." In his written statement the Appellant averred that the decree of 14th April 1856, and subsequent proceedings in execution, were taken against Jhanguri Rai and his son Jaipargash Rai, and that these persons being judgment debtors, the property, being ancestral, was liable to attachment for their debt. He also pleaded that, according to the provisions of Sections 13 and 43 of Act X. of 1877, the claim put forward by the Respondents was no longer cognizable, inasmuch as it had already been adjudicated upon, in a regular suit, before the District Court of Shahabad.

The cause was tried upon six issues, which need only be noticed in so far as they relate to the main question raised in these appeals:—

" III. Is the claim of the Plaintiffs barred by Sections 13 and 43 of the Code of Civil Procedure?

" IV. Are the Plaintiffs or their ancestors liable for the judgment debt, and is the property liable to sale or not?"

The Subordinate Judge, upon the 21st December 1882, sustained the Appellant's plea in bar, and dismissed the suit with costs. His

decree was carried by appeal to the High Court of the North-Western Provinces, by whom it was reversed on the 9th May 1885, and the case remanded to the Sub-Judge for disposal on the merits. As the decision of the High Court on that occasion has been impeached in these appeals, it may be convenient to state here that, in the opinion of their Lordships, it was well founded. None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Judge of the Shahabad Court in 1881; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of Chapter VII. of the Code; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the Plaintiff cannot bring another suit for the same relief. Assuming that the Respondents are barred from seeking relief against the attachment and sale of their interest in mehal Umarpur, the decree of 21st July 1881 does not disable them from claiming relief against the attachment and sale of their interest in Narhi, or in any other property which was not included in the judicial sale of Umarpur.

Acting under the remit made to him by the High Court, the Subordinate Judge, on the 21st July 1885, found as matter of fact that the Respondents' ancestor, Jhanguri Rai, was a Defendant in the suit of 1855, and was one of the parties decerned against, as liable for mesne profits by the judgment of the 14th April 1856. Upon that finding the learned Judge dismissed the Respondents' suit with respect to one half of the interests claimed by them, but sustained it with respect to the other half, which he held to have been vested, by force of Hindu law, in their father Jaipargash, who was admittedly not

made a party to the proceedings of 1855 and 1856 at the instance of the Maharaja. Against that decision both parties appealed to the High Court, who, on the 5th August 1886, made an order remanding the case for the trial of the following points, and distinct findings upon them :—

(1.) Was Jhanguri Rai, the grandfather of the Plaintiffs, a co-sharer or in possession of the lands to which the litigation of 1855 related, and which ended in the decree of 14th April 1856?

(2.) If so, was any process of Court in that litigation issued or served upon him?

(3.) When did the Defendant first seek to execute his decree against the Plaintiffs, either at Ghazipur or Shahabad; and were they or any of their ancestors, viz., Jaipargash or Jhanguri, parties to the execution proceedings which ended in possession of the property in suit, to which the decree of 1856 related, being given to the Defendant by proceedings which ended on the 12th July 1874?

Their Lordships entertain serious doubts whether the Court was justified in making the remand, by the provisions of Section 566 of the Civil Procedure Code. All the points remitted were substantially covered by the issues which had been previously sent for trial in the Court below; and it appears to their Lordships that there were sufficient materials for the decision of the case, to which little or nothing has been added by the evidence taken on remand.

On the 20th November 1886 the Subordinate Judge found upon the several points referred to him by the High Court. Upon the first point he found that Jhanguri was a coparcener and in possession at the dates specified; upon the second, that the issue of process to Jhanguri was not

proved; and, upon the third, that it was not clearly proved that Jhanguri was a party to the proceedings in execution which resulted in possession of the disputed property being given to the Maharaja in the year 1874.

These findings, together with the oral evidence taken on remand, were duly submitted to the High Court, who, on the 4th May 1887, reversed the Subordinate Judge's decree of the 21st July 1885, and gave judgment for the Respondents in terms of their plaint with costs. The decision of the Court was delivered by Mr. Justice Straight, Mahmud, J., concurring. Their Lordships agree with the conclusion at which these learned Judges arrived, although they are unable to concur in all the reasoning upon which it is based.

Mr. Justice Straight says, with reference to a statement made by the Respondents' pleader on the 27th September 1882, "It seems to me, so "far as the Plaintiffs were then concerned or "are concerned now, the sole position for which "they have contended was that their ancestor "Jhanguri was not the judgment debtor under "the decree of the 14th April 1856." And the learned Judge adds, "The whole matter, "therefore, between the parties resolves itself "into the single question of fact,—Was or was "not Jhanguri, the ancestor of the Plaintiffs, "a judgment debtor under the decree of the "14th April 1856?" The statement in question was not intended to be, and was not, a rehearsal of the whole facts relied on by the Plaintiffs, but was made by their pleader in answer to specific questions put to him by the Subordinate Judge; and the issues which went to trial were not confined to that statement, but raised the general question whether the ancestors of the Plaintiffs were judgment debtors under the decree by virtue of which the Respondent had attached and sold

their interest in the lands of Narhi and others. That misconception of the real issue probably led to the remand of the 5th August 1886, and it certainly induced the High Court, in its ultimate decision upon the merits of the case, to deal with many points which do not appear to their Lordships to require consideration.

The Respondents endeavoured to prove that Jhanguri Rai predeceased his father Achraj some time before the year 1840; but their evidence on that point does not appear to be reliable, and their Lordships are disposed to think that the Subordinate Judge was right in holding that Jhanguri was a coparcener in possession at the date of the decree of 1856, and was alive for many years afterwards. The terms of that decree, as well as of the written statement for the Defendants, and of their petition for leave to file documents,—in all of which the name of Jhanguri occurs in connection with the whole other descendants and heirs of Achraj Rai then in life,—afford *primâ facie* evidence that he was a party to the suit, and was included in the decree itself. Whether that inference is displaced by antecedent evidence derived from the pattidari papers of 1840, their Lordships do not think it necessary to determine. In their opinion, it is an obvious mistake to assume that the right of the Appellant to take the Respondents' land in execution for mesne profits wholly depends upon the fact of their ancestor being a party to the decree of 1856. None of the defendants were, by that decree, made judgment debtors for mesne profits, in the sense that their property could be attached by virtue of it. The decree, no doubt, found that defendants in the suit were accountable for mesne profits, and by that finding they were bound; but it did not ascertain the amount of such profits, or determine the important question whether the

defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until March 1877, when for the first time the Appellant obtained a money decree which was capable of being put into execution. But, according to the testimony of the Appellant's own witnesses, Jhanguri died at least twelve months before that date. It does not clearly appear whether his son Jaipargash was then alive; but it is matter of certainty that neither Jaipargash nor the Respondents were made parties to the suit, in room of Jhanguri.

An operative decree, obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The Appellant must pay to the Respondents their costs in these appeals.