

## Baboo And Ors. vs Mt. Kirpa Dai And Anr. on 21 March, 1950

**Equivalent citations: AIR1950ALL488, AIR 1950 ALLAHABAD 488**

### JUDGMENT

Agarwala, J.

1. This is a defendants' appeal arising out of a suit for partition.
2. The plaintiff respondent and the pro forma defendant Shrimati Tejo claimed to be the owners of a half share in the property in suit. They relied upon a previous decree in support of their claim. The defence to the suit was that the plaintiff and the pro forma defendant Shrimati Tejo had no share in the property at all and that the previous decree did not operate as res judicata.
3. The trial Court upheld the defence and dismissed the suit. The lower appellate Court, however, held that, although the plaintiff and the pro forma defendant Shrimati Tejo could not prove that they had half share, the point was concluded by the previous judgment as against the defendants who were parties thereto, and, therefore, it decreed the suit.
4. In this second appeal the only point urged is that the previous decree did not operate as res judicata.
5. The facts relating to this matter are as follows: One Ram Sarup had a simple money decree against the contesting defendants. He attached the property in suit as belonging to them. There was an objection filed by the plaintiff and Shrimati Tejo under Order 21, Rule 58, Civil P. C. On the objection being dismissed, the plaintiff filed a suit under Order 21, Rule. 63, Civil P. C., impleading Shrimati Tejo as a pro forma defendant. The plaintiff claimed that she and Shrimati Tejo were owners of half share in the property. Ram Sarup and the present contesting defendants were impleaded as defendants. Ram Sarup alone appears to have contested the suit. Then there was an arbitration. It is not known whether the contesting defendants were parties to the agreement of reference to arbitration. The arbitrator gave an award holding that the plaintiff and Shrimati Tejo were owners of a half share in the property. The Court passed a decree in terms of the award not only against Ram Sarup but also against the present contesting defendants.
6. The contention of Mr. Mukerji is that the contesting defendants did not contest the previous case, but were in collusion with the plaintiff and indeed had themselves instigated the plaintiff to file that suit in order that the property may not go out of the family, that the contesting defendants were no parties to the arbitration proceedings and that for these reasons the decision in the previous suit was not binding on them as res judicata.

7. The lower appellate Court has held that it has not been established that the previous suit was a collusive suit so far as the present contesting defendants are concerned. But assuming that it was so, the point remains that the suit was not intended to be unreal. It was at least intended to take away the property from the clutches of a creditor.

8. The question is whether even if one of the defendants to the suit is in collusion with the plaintiff, the decision can be said to be binding on the defendants on the principle of *res judicata* ? I think that the answer must be in the affirmative. What one has to see is that an issue which has been raised in the subsequent suit was raised in the previous suit directly and substantially between the parties and that it was finally decided. The issue whether the plaintiff and Shrimati Tejo were owners of half share in the property was directly and substantially in issue in the previous suit not only as between the plaintiff and Ram Sarup, but also between the plaintiff and the present defendants-appellants. By the decision of the suit against them, they stood to lose the title in half the property. Assuming that they were in collusion, that would not affect the issue being substantially and directly in question. The only effect of the collusion would be that they would not contest the suit and let an *ex parte* decree be passed. But even *ex parte* decrees and consent decrees operate as *res judicata*.

9. The next question is whether the previous decision is not binding on the defendants-appellants because there is nothing to show that they were parties to the arbitration proceedings ? The decree is on the record. It does not show that the defendants-appellants were not parties to the arbitration proceedings,

10. Assuming, however, that the defendants-appellants were no parties to the arbitration, the fact remains that the Court did pass a decree against them in terms of the award. Till that decree is set aside, the decree is binding on them. Mr. Mukerji has urged that the decree in substance must be held to have been passed without jurisdiction and that if the decree was passed without jurisdiction, there could be no *res judicata*. But I do not think that it can be said that the decree was passed without jurisdiction. There might have been evidence on the record other than the evidence of the award to prove the plaintiff's case, and it may be that the Court passed the decree because of that other evidence. When the decree was against the defendants-appellants, it was for them to prove that there was no other evidence against them and the Court passed a decree without any evidence. Such a decree may be set aside in proper proceedings but so long as it is not set aside it remains binding and cannot be brushed aside or ignored as if it was a decree passed by a Court which had no jurisdiction to pass it.

11. It must be noted that the jurisdiction of the Court Under Section 11, Civil P. C., is not to be considered in the same light as one would consider a case proceeding Under Section 115, Civil P. C. A decree without jurisdiction Under Section 11 must be a decree in a suit which the Court had no jurisdiction to entertain; and the mere fact that the Court acted illegally or with material irregularity in the exercise of its jurisdiction will not affect the jurisdiction of the Court under the provisions of that section.

12. In the present case, the Court had undoubted jurisdiction to entertain the suit and to decide it. Its decision was, therefore, binding as of a Court having jurisdiction unless it was set aside. I am, therefore, of opinion that the previous judgment operated as res judicata between the parties. No other point has been raised.

18. The appeal is accordingly dismissed with costs.