

**(1977) 04 CAL CK 0014****Calcutta High Court****Case No:** First Appeal No"s. 376-77 of 1976

Ekbaljan Peshwari

APPELLANT

Vs

Tarabai Baiji

RESPONDENT

**Date of Decision:** April 26, 1977**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 11

**Citation:** 81 CWN 735 : (1977) 1 ILR (Cal) 541**Hon'ble Judges:** Sharma, J; M.M. Dutt, J**Bench:** Division Bench**Advocate:** Ranjit Kumar Banerjee, Sukumar Sen and Asoke Banerjee, for the Appellant; Saktinath Mukherjee and Bhaskar Ghose, for the Respondent**Judgement**

M.M. Dutt, J.

These two appeals are at the instance of the same Plaintiff and they arise out of two suits for declaration of the tenancy right of the Plaintiff and for possession. The only question that is involved in these appeals is whether the decision in a former suit will operate as res judicata in the present suits.

2. In the present suits, the Plaintiff Ekbaljan Peshwari has prayed for a declaration of her tenancy right in respect of the first floor of premises No. 263 Bowbazar Street, Calcutta, under one Sm. Jarat Kumari Dassi and after her death under her executor Radha Kishen Roy since deceased and Mohon Kishore Roy as the joint executors to her estate. The said Mohon Kishore Roy also died during the pendency of the suits and the Defendant No. 3 Dipak Basu, Barrister-at-Law was substituted in his place as the Receiver to the estate of the said Sm. Jarat Kumari Dassi. It is alleged that the Defendants Nos. 1 and 2, Sm. Tarabai Baiji and Sm. Pannabai Baiji, forcibly occupied the first floor of the said premises during the absence of the Plaintiff from Calcutta. It is, further, alleged that the Defendant No. 3 has accepted the Defendants Nos. 1 and 2 as direct tenants under him. The Plaintiff has, accordingly, prayed for a

declaration of her tenancy right in respect of the suit premises and also for a decree for possession of the same.

3. It appears that previous to the present two suits out of which these appeals arise, a suit being Suit No. 726 of 1964 was instituted in the Original Side of this Court. In the said suit, the Plaintiffs were the present Plaintiff Ekbajan Peshwari and one Omar Khan and the Defendants were the same as in the present suits, except that the Defendant No. 3 was the said Mohon Kishore Roy, the surviving executor to the estate of Sm. Jarat Kumari Dassi. In that suit, the Plaintiff No. 2 Omar Khan alleged that he was the husband of the Plaintiff No. 1 Ekbajan Peshwari and prayed for a declaration that he alone was the direct tenant in respect of the first floor rooms of the said premises No. 263 Bowbazar Street, Calcutta, now Bepin Behari Ganguli Street, his wife Ekbajan Peshwari being his benamdar and the Defendants Nos. 1 and 2, that is, Tarabai Baiji and Pannabai Baiji were his licensees. He also prayed for possession of the suit premises, that is, the first floor rooms of the said premises No. 263 Bowbazar Street, Calcutta. Although the said suit was instituted by the two Plaintiffs Ekbajan Peshwari and Omar Khan, it was really instituted by the second Plaintiff Omar Khan for self and as the Attorney of Ekbajan Peshwari under a power-of-attorney alleged to have been executed by her on May 15, 1963. It may be stated at this stage that at the time the said suit was instituted in this Court, another suit being Suit No. 166 of 1961 was pending in the City Civil Court, Calcutta, which was instituted by Omar Khan against Ekbajan Peshwari. In the City Civil Court suit, Omar Khan prayed for a declaration that Ekbajan Peshwari was his legally married wife under the Mahomedan Law. It appears that Ekbajan appeared in the said suit and contested the same by filing a written statement denying the allegation of Omar Khan that she was the legally married wife of the latter. Omar Khan did not proceed with the said suit as it was alleged by him that Ekbajan had left India for Kabul on February 8, 1962. The suit was consequently dismissed for non-prosecution.

4. In the High Court Suit No. 726 of 1964, 8 issues were framed of which issues Nos. 1, 3 and 6 were as follows:

(1) Is the instant suit maintainable?

(3) Is the first Plaintiff, Ekbajan Peshwari, the wife and the benamdar of the second Plaintiff", Omar Khan?

(6) Are the first two Defendants tenants or licensees of the suit premises? If so under whom?

5. Bijayesh Kumar Mukherji J., who tried the suit, by his judgment dated May 9, 1968, came to the finding that Omar Khan had failed to prove that Ekbajan Peshwari was his lawfully married wife; that there was no material to show that Ekbajan Peshwari was the benamdar of Omar Khan; that the power-of attorney on the strength of which Omar Khan filed the suit as the constituted Attorney of Ekbajan Peshwari was

not executed by her and as such, it was an invalid document and that the suit was not maintainable. His Lordship also held that the Defendants Nos. 1 and 2 were the tenants of the suit premises under the Defendant No. 3 Mohon Kishore Roy. Upon the said findings, his Lordship dismissed the suit.

6. The Defendants strongly relied on the said judgment of. Bijayesh Mukherji J. in the said High Court suit and contended that the present two suits in which the issues were substantially the same as in the High Court suit were barred by res judicata. The learned Judge, Seventh Bench, City Civil Court, Calcutta, took the view that the High Court judgment operated as res judicata in the present suits. In that view of the matter, he dismissed both the suits as barred by res judicata. Hence these appeals.

7. In order that a suit may be held to be barred by res judicata as embodied in Section 11 of the Code of Civil Procedure, one of the conditions that must be fulfilled is that the former suit was between the same parties as in the subsequent suit or between parties under whom they or any of them claim. Mr. Ranjit Kumar Banerjee, learned Advocate appearing on behalf of the Plaintiff, submits that as in the High Court suit it was held that the present Plaintiff Ekbajan Peshwari did not execute the power-of-attorney, or in other words, the power-of-attorney having been found to be invalid, it should be held that the present Plaintiff was not a party in the High Court suit. It is, accordingly, contended by him that the parties in the High Court suit and in the present suits are not the same and so the said condition is not fulfilled and the provision of Section 11 is not attracted. There is some force in this contention. There is a clear finding in the High Court suit that the power-of-attorney was not executed by Ekbajan Peshwari and consequently it cannot be said that Ekbajan was a party in that suit. It is not disputed that unless the present Plaintiff Ekbajan was also a party in the High Court suit, the judgment of that suit would not operate as res judicata in the present suits instituted by her.

8. Mr. Sakti Nath Mukherjee, learned Advocate appearing on behalf of the Defendants-Respondents, however, submits that in the facts and circumstances, which will be presently indicated, it should be held that Ekbajan was a party in the High Court suit. He has drawn our attention to the plaint statements of the present, Plaintiff in Title Suit No. 591 of 1971. In the plaint, the Plaintiff has admitted that Omar Khan, who is the Defendant No. 4, is her husband. In para. 8 of the plaint, she admits to have granted a power-of-attorney in favour of her husband Omar Khan on or about May 15, 1963. It is contended by Mr. Mukherjee that in view of the said admission of the Plaintiff Ekbajan Peshwari, it should be held that the power-of-attorney was executed by her in favour of her husband Omar Khan and that she was, therefore, a party in the High Court suit. We regret, we are unable to accept this contention. A finding by a competent Court on an issue framed in a suit is binding upon the parties thereto. Such a finding cannot be set aside, modified or varied at the instance of any of the parties in a subsequent suit. For the purpose of

res judicata, the Court will only look to the findings and not to the admissions made by any of the parties before it. If the findings in a previously instituted suit are to be ignored on the basis of the statements made in the subsequent suit, the doctrine of res judicata as embodied in Section 11 would lose all solemnity. Even assuming that the power-of-attorney is valid and Ekbajan was a party to that suit through Omar Khan on the basis of the said power-of-attorney, still the Court having rejected the power-of-attorney at the instance of the present Defendants Nos. 1 and 2 as not having been executed by Ekbajan Peshwari and no appeal from the judgment in the said High Court suit having been preferred, the finding is binding upon not only Ekbajan but also upon the Defendants Nos. 1 and 2. The Defendants Nos. 1 and 2, in our view, cannot now turn round and rely on the admission made by the Plaintiff in support of their contention that the present suits are barred by res judicata. We are, therefore, of the view that the learned Judge was not right in dismissing the suit as barred by res judicata.

9. It is also contended on behalf of the Plaintiff-Appellant that in the High Court suit, as it was found that the suit was not maintainable, the finding that the Defendants Nos. 1 and 2 were the tenants in respect of the said premises should be looked upon as obiter and should not be taken notice of for the purpose of res judicata. In our opinion, in view of our decision that the present suits are not barred by res judicata, it is not necessary to decide this point.

10. For the foregoing reasons, we set aside the judgment and decree of the learned Judge, Seventh Bench, City Civil Court, Calcutta, in both the suits and allow these two appeals. The learned Judge is now directed to dispose of the suits in accordance with law.

11. There will, however, be no order as to costs in either of these appeals. Let the records be sent down as quickly as possible.

Sharma J.

12. I agree.