
(1903) 04 BOM CK 0001
In the Bombay High Court

Bhikabhai Ratanchand

APPELLANT

Vs

Bai Bhuri

RESPONDENT

Date of Decision : 01-04-1903

Acts Referred:

Contract Act, 1872 — Section 130

Citation : (1904) ILR (Bom) 272

Hon'ble Judges : Crowe, J;Chandavarkar, J

Bench : Division Bench

Judgement

Chandavarkar, J.—We agree with the Courts below in the view that the present suit, which was brought by the plaintiff to recover the arrears of maintenance for two years and nine months, commencing with the 27th September, 1898, due upon a deed executed by the first defendant, who is her husband, and by the second defendant as surety for him, is not barred so far as the second defendant's liability is concerned by the decree in Suit No. 568 of 1898.

2. In that suit, no doubt, the plaintiff sought to hold the second defendant liable as surety for the arrears claimed therein on the basis of the deed on which the present action is founded, and it is also true that the Subordinate Judge passed a decree therein for the arrears claimed as against defendant 1 only. But "in order to see what was in issue in a suit or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Civil Procedure, is only to state the relief granted or other determination of the suit"; *Kali Krishna Tagore v. The Secretary of State for India* (1838) L.R. 15 IndAp 193 : 16 Cal. 173 Now, the judgment in the previous suit did not decide the question of the second defendant's liability as surety in his favour. On the other hand, it shows that the Subordinate Judge found that the deed was executed by both the defendants and was supported by consideration, and that the plaintiff was entitled to the reliefs sought. But for some reason or other in the decretal order he held the first defendant only liable for the arrears. Taking the judgment and the decree together, we think we must take them to mean that the

Subordinate Judge refused merely the relief as to the arrears claimed in the suit so far as defendant 2 was concerned. That is the only point which is *res judicata* as against the plaintiff. She alleged her right as against that defendant as surety, and that was found in her favour in the judgment, and the mere fact that the arrears of the particular period to which the previous suit related were not allowed by the decree, so far as defendant 2 was concerned, cannot bar her right to sue him as surety on the same document as to the arrears of a subsequent period, the cause of action as to which is distinct and separate. "Where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shown that the plaintiff had an opportunity of recovering, and, but for his own fault, might have recovered in the former suit that which he seeks to recover in the second action"; per Willes J. in *Nelson v. Couch* (1863) 15 C.B.N.S. 96 . Applying this principle to the facts of the present case, the plaintiff could not have recovered in the former suit the arrears now claimed, for then they had not become due. All that she could have done in that suit she did. She could have relied on the deed and sought to hold defendant 2 liable on it, and she did both. The judgment was that defendant 2 was liable on the deed; so far her general right based on the deed was found in her favour. All that went against her was the decretal order refusing to award to her the arrears due for the period to which the suit related. Her present suit is not for those arrears, but is for the arrears due for a subsequent period, and in virtue of a general right based on the deed passed by both the defendants and found valid and binding as against both in the previous suit. The plea of *res judicata*, therefore, fails.

3. As to the second point, the mere fact that the second defendant denied his liability as surety in the previous suit cannot be regarded as a notice putting an end to the contract u/s 130 of the Contract; Act. That denial was made for the purposes of pleading, and cannot have any other effect given to it than was given in the suit itself. See *Balaji Sitaram v. Bhikaji Soyare* (1881) 8 Bom. 164 where Westropp, C.J. held that a mere denial of liability by a party in a previous suit cannot operate as notice. Moreover, the second defendant in the previous suit denied the existence of a legal contract; such denial cannot be given the effect of a notice to the plaintiff that the second defendant wished to put an end to a legal contract which is proved. We confirm the decree with costs.