
(1898) 01 CAL CK 0012
In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 695 of 1895

Rai Churn Ghosh and others

APPELLANT

Vs

Kumud Mohan Dutt Chowdhury and others

RESPONDENT

Date of Decision : 12-01-1898

Acts Referred:

Citation : (1898) 01 CAL CK 0012

Final Decision : Allowed

Judgement

Banerjee, J.—This case was heard along with appeal from Appellate Decree No. 759 of 1895. One of the grounds upon which the learned vakil for the Respondents sought to support the decision of the lower Appellate Court that the judgment in a previous rent suit did not operate as res judicata, was that the matter in dispute in the former suit could not, by reason of its value being below Rs. 100, be taken up to the High Court in second appeal, whereas the matter now in dispute being in value above that limit, a second appeal was allowed in this suit. We considered this ground untenable, holding that even if the proposition of law upon the assumed correctness of which it was based was correct, it did not affect this case, as a second appeal in fact lay in the former suit. This is quite true as regards one of the two cases, namely, Appeal from Appellate Decree No. 759 of 1895; but it is, as has been shown to us now, not true with reference to appeal from Appellate Decree No. 695 of 1895, the decision upon which the plea of res judicata is based in this case, having been passed in a case in which no second appeal lay. An application for review of judgment was made in this case on the ground of there being the above-mentioned error in our decision; the application was granted; and the case was reheard under sec. 630 of the Code of Civil Procedure.

2. The ground upon which the lower Appellate Court's judgment is based is untenable and this is conceded by the learned vakil for the Respondent. The only question now raised before us is whether the decision in the former case upon the matter of instalments can operate as res judicata in this, when a second

appeal in that case was barred by sec. 153 of the Bengal Tenancy Act, whereas in the present case a second appeal is not barred. If this question is answered in the affirmative the appeal succeeds. If it is answered in the negative the appeal must fail.

3. The learned vakil for the Appellants contended in the first place that the question did not arise, and that a second appeal was not barred in the previous case by sec. 153 of the Bengal Tenancy Act, as the judgment of the first Appellate Court by deciding the question of instalments, determined the interest payable on the arrears of rent, and thus decided a question relating to rent; and in the second place he contended that even if the question did arise, it ought to be answered in the affirmative as the issue relating to instalments now raised was directly and substantially in issue in the former suit between the same parties in a Court of jurisdiction competent to try the present suit, and has been heard and finally decided by such Court of and it was none the less a Court of competent jurisdiction because a second appeal was barred in the case. On the other hand, the learned vakil for the Respondents urged in the first place, that the question did arise, as a second appeal was barred in the former case, a question relating to interest being different from one relating to "the amount of rent annually payable" within the meaning of sec. 153, and in support of this contention he relied upon the case of Kailas Chunder Dey v. Tarak Nath Pal I. C. W. N. lxiii, and in the second place he contended that the question should be answered in the negative, as sec. 13 of the CPC required that the former suit, the decision in which was pleaded as *res judicata*, should be triable not only in the first instance but also in successive appeals by the same Courts by which the second suit is triable; and in support of this contention he cited the cases of Bholai Bai v. Adesang I. L. R. 9 Bom. 75, Vithilinga Padayachi v. Vithilinga Mudali I. L. R. 15 Mad. 111, Misir Raghobar Dial v. Raja Sheo Baksh Sing I. L. R. 9 I. A. 197, and Edun v. Bechun 8 W. R. 175.

4. I am of opinion that in the former case no second appeal lay, as the question relating to instalments, though it affected the question of interest on the rent, was not a question of "the amount of rent annually payable " within the meaning of sec. 153 of the Bengal Tenancy Act, and I fully agree in the view taken in the case of Kailas Chunder Dey v. Tarak Nath Pal 1 C. W. N. lxiii cited for the Respondent.

5. That being so, the question stated above does arise in this case, the question is one of considerable importance and of no small difficulty. The answer to the question must be sought for in the first instance in sec. 13 of the Code of Civil Procedure, and if that section leaves the matter in doubt, then in the general principles, relating to the doctrine of *res judicata*.

6. Sec. 13 enacts (I quote only so much of the section as bears upon the question before us) that "no Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit between the same parties in a Court of jurisdiction competent to try such subsequent suit or the

suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

7. Now, the matter in issue in this suit, namely, whether the rent of the Defendant's holding is payable quarterly or annually, was also directly and substantially in issue in the former suit brought in the Munsif's Court which was competent to try the present suit; the issue was decided against the Defendants by the Munsif: but on appeal, the Appellate Court, that is the Court of the Subordinate Judge, which was competent to try the first appeal in the present suit, finally decided the issue in favour of the Defendants. As has been said above, a second appeal was barred in the former suit by reason of its value, but a second appeal is not barred in the present suit. Does this case then come within the rule of *res judicata* enunciated in sec. 13 of the CPC ? I think it does. The section applies to two classes of cases in one of which a subsequent suit is wholly barred by the decision in a former suit by reason of the subject-matter of the two suits being the same; and in the other the trial of an issue in a subsequent suit is barred by the adjudication upon the same issue in a former suit though the subject-matters of the two suits are different. The present case comes under the latter class; but it is not a simple type of that class. The simplest type is that in which the trial of an issue in a subsequent suit is barred by the adjudication upon it in a former suit by the first Court in which it was brought, and which was competent to try the subsequent suit. Here the adjudication relied upon was in the Court of Appeal in the former case. But that alone cannot affect the application of the section. It would be most unreasonable to hold that a decision does not operate as *res judicata* merely because it is the decision of the Appellate Court in the former suit. It is true that the section speaks of the matter being "heard and finally decided by such Court," that is the "Court of jurisdiction competent to try" the subsequent suit; and it is true also, that if the Court spoken of in the section can mean the Court of Appeal in the previous suit, it may lead to the decision of an Appellate Court in a previous suit cognizable in the first instance by the Munsif operating as *res judicata* in a subsequent suit of value exceeding the limit of the Munsif's jurisdiction by reason of such suit being cognizable by the Appellate Court, a result evidently not contemplated by the section, as has been held on several cases; see *Bharsilal Choudhary v. Sarat Chandra Das* I. L. R. 23 Cal. 415, *Pathuma v. Salimanind* I. L. R. 8. Mad. 83, *Run Bahadur v. Lucho Koer* I. L. R. 11 Cal. 301. But the difficulty is completely removed if we read the words "heard and finally decided by such Court" to mean heard and finally decided by such Court either if no appeal is preferred from its judgment or if an appeal being preferred has been disposed of, and the judgment of the Appellate Court which takes the place of its judgment has decided the point. This view is in accordance with Explanation IV of the section and with sec. 581, which requires the appellate judgment to be entered in the register of suits in the first Court. Thus understood, the section clearly applies to a case like the present.

8. It remains now to consider whether the fact of a second appeal being barred

in the former suit and not being barred in the present can make any difference. There is nothing in sec. 13 to indicate that the judgments in two suits must be open to appeal in the same way in order that the decision upon any issue in the earlier suit can bar the trial of the same issue in the later one.

9. It was urged by Dr. Asutosh Mukerji, who in his concise but clear argument has placed before us all that could be said in favour of the Respondents, that sec. 13 is not very clearly worded, that a literal construction of it would lead to many anomalous results, and that a reasonable construction of the section requires that not only should the Court which tried the former suit be of jurisdiction competent to try the subsequent suit, but its judgment in the former suit should be opened to appeal in the same way as the judgment in latter suit is. No doubt it must be conceded that the wording of the section is in some respects faulty and that a literal construction of the section would lead to many anomalies. This has already been observed with reference to the words finally decided by such Court. Another and a still greater anomaly was noticed with reference to the "words competent to try such subsequent suit" in the cases of *Gopinath Chobey v. Bhugwat Pershad* I. L. R. 10 Cal. 699 and *Raghunath Panjah v. Issur Chunder Chowdhury* I. L. R. 11 Cal. 153 in which it was held that those words must be taken to mean competent to try the subsequent suit if it had been brought at the same time that the former suit was brought. It may also be conceded that as an estoppel, to use the language of Sir B. Peacock in *Edun v. Bechun* 8 W. R. 175, "shuts out enquiry into the truth," it is necessary to see that the principle of res judicata is not unduly enlarged, and that it would be a wholesome restriction to the rule of res judicata if it is held that in order that a judgment in a former suit may be conclusive upon any issue arising in a subsequent one, it must have been open to appeal in the same way as a judgment in the subsequent suit is. Indeed one might go further and say that the proper application of the doctrine of res judicata should be confined to a subsequent suit relating to the same subject-matter, and that the extension of the doctrine to exclude the trial of an issue in a subsequent suit relating to a different subject-matter, merely because that some issue was tried in a previous suit in a Court of jurisdiction competent to try the subsequent suit, is of doubtful propriety for this, amongst other reasons, that a suit for a comparatively small amount, say Rs. 160, though triable only in a Subordinate Judges's or a District Judge's Court which is of jurisdiction competent to try a suit for a lakh of rupees and more is not likely to be conducted by the parties with the same interest and the same care in the production of evidence as a suit of the latter description. But these are matters for the legislature and not for the Court to consider. The duty of the Court is to construe the law as it stands, and not to make a new, though it may be a better law. It is quite true that in interpreting a statute to meet the obvious intention of the Legislature "a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence." (See *Maxwell on the Interpretation of Statutes*, Ch. IX), but that is allowed only where the Court is coerced to do so, to avoid some serious injustice, or to prevent a statute from

being reduced to a nullity or for any other similar reason. (See Ex parte Rashleigh L. R. 2 Ch. Div. 13 Salmon v. Duncombe L. R. 11 App. Cas. 627 In the present case it cannot be said that any such reason forces us to adopt the strained construction contended for on behalf of the Respondents, for which the words used in the section afford no warrant; moreover, the construction contended for will, in cases like the present, be attended with some anomaly if not also hardship and injustice. For if that construction be accepted, then to undo the effect of a judgment in a previous suit for rent in which a second appeal was barred either party may wilfully raise a false and confounded dispute as to the amount of rent in the subsequent suit to make a second appeal allowable under sec. 153 of the Bengal Tenancy Act.

10. Of the cases cited Bhola Bai v. Adesang I. L. R. 9 Bom. 75 and Vithilinga Padayachi v. Vithilinga Mudali I. L. R. 15 Mad. 111 are no doubt in point, but for the reasons given above I must respectfully dissent from them. As for the cases of Missir Raghubur Doyal v. Sheo Buksh Singh L. R. 9 I. A. 197 and Edun v. Bechun 8 W. R. 175, they are clearly distinguishable from the present. The question raised in these cases was whether a judgment passed by a Court in a previous suit was conclusive upon any matter raised in a subsequent suit when the Court which tried the former suit was incompetent to try the latter; and that question was answered in the negative. There are, no doubt, certain observations in the judgments in those two cases which may seem to favour the Respondents' contention, but they must be taken in connection with the point which the Court had to determine and so considered, they do not warrant the view which the learned vakil for the Respondents asks us to take. I should add that the view I take is supported by the case of David v. Girish Chunder Guha I. L. R. 9 Cal. 183.

11. For the foregoing reasons I must hold that the judgment in the previous suit operates as res judicata upon the question of instalments. This appeal must consequently be allowed, the decree of the lower Appellate Court reversed and that of the first Court restored with costs in this Court and in the Court below.

Macleay, C.J.

I have had the advantage of reading Mr. Justice Banerjee's judgment and I concur.