

## PRIVY COUNCIL.

P. C.  
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June 22, 25 ;  
July 30.

ABDULLAH ASHGAR ALI KHAN

v.

GANESH DASS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER IN  
BALUCHISTAN.]

*Res judicata*—British Baluchistan Regulation (IX of 1896) s. 10—Issue not  
“finally decided” in former suit—Civil Procedure Code, 1882, s. 13—  
Defence of fraudulent representation in suit on a bond.

Section 10 of the British Baluchistan Regulation IX of 1896 creates an estoppel by judgment only when the “matter in issue” has been “finally decided.”

*Sheosagar Singh v. Sitaram Singh* (1) followed.

That was a case under s. 13 of the Civil Procedure Code, 1882, which, so far as the question under discussion is concerned, is similar to section 10 of the Baluchistan Regulation.

The appellant (defendant) had brought a suit for cancellation of a bond on the ground that he was induced to execute it by the fraudulent representations of the respondent (the present plaintiff). The first Court held that he had failed to establish the fraud, and that decision was affirmed on appeal by the District Judge. He then brought a second appeal to the Judicial Commissioner who declined to go into the merits of the case and, upholding an objection by the respondent to the frame of the suit, dismissed the appeal. In a suit brought by the respondent to enforce the bond, the appellant raised the same issue as before, and the two lower Courts held that the issue was *res judicata*, and the Judicial Commissioner dismissed an appeal to him from that decision.

*Held* by the Judicial Committee, that the defence in the present suit was not *res judicata*, the allegation regarding the execution of the bond on the fraudulent representations of the respondent never having been “finally decided” in the Judicial Commissioner’s Court.

\* *Present*: LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

APPEAL No. 36 of 1916 from a judgment and decree (31st March 1914) of the Judicial Commissioner in Baluchistan, which affirmed a judgment and decree (21st November) of the Court of the District Judge, Quetta-Pishni.

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The defendant was the appellant to His Majesty in Council.

The facts are sufficiently stated in the judgment of the Judicial Committee.

The only question for determination in the present appeal was whether or not the suit which gave rise to the appeal was barred as being *res judicata*.

The judgment appealed from was as follows :—

The Judicial Commissioner (MR. C. ARCHER) said :  
 “The appellant, Abdullah Ashgar Ali, has admitted the execution of the bond on which the respondent Ganesh Dass sued him, and has also admitted that he has paid nothing on it. In a previous suit against the respondent, he endeavoured to have the bond set aside on the ground that it had been obtained by misrepresentation. The Original Court and the first Appellate Court held that the bond was not voidable on that ground; and on further appeal this Court, while expressing no final opinion as to the validity or otherwise of the agreement to dissolve partnership on which the bond was based, held that unless and until that agreement was set aside, the bond could not be impugned.

“The objections urged in this memorandum of appeal, in so far as they are not merely formal, are a repetition of the arguments of the appellant in the former suit based on his contention that the dissolution agreement and the consequent bond was obtained from him by misrepresentation. The appellant has further requested this Court to send for and inspect the plaint in a suit which he has now instituted to

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have the dissolution agreement set aside. It is, however, not open to this Court at this stage to take into consideration the steps which appellant may now be taking to avoid the agreement. The present case has been pending for nearly 18 months, its disposal having been delayed by the appellant's efforts to have the bond set aside. These efforts have failed, and it would not be equitable that the respondent's remedy should be further delayed pending the issue of the attempt now being made to impugn the agreement of dissolution. In so far as the bond is concerned, the lower Court was, in my opinion, right in holding that the points raised by the appellant were *res judicata*. It is not the case as stated in paragraph 1 of the appeal that the Appellate Court did not examine the parties. As regards the other formal defects alleged, in so far as they exist, they are not, in the circumstances, such as to occasion a failure of justice, and are therefore cured by section 92 of the Civil Justice Regulation."

The appeal was accordingly dismissed.

On this appeal,

*A. M. Dunne*, for the appellant, contended that the defence to the suit which had been raised by the appellant was not barred as being *res judicata*. He was therefore entitled to have issues duly raised and his defence considered according to law, and on its merits. The judgment purporting to be effective as a *res judicata* must be one in which the issue in dispute between the parties has been "finally decided"; that is not the case here: section 10 of the British Baluchistan Regulation IX of 1896 was referred to. The merits of the issue of fraud were not gone into on the appeal to the Judicial Commissioner; the matter was therefore not finally decided. Reference was made to *Sheosagar Singh v. Sitaram Singh* (1) *per* Lord

(1) (1897) I. L. R. 24 Calc. 616 ; L. R. 24 I. A. 50.

Macnaghten, *Gunga Bishen Bhuyut v. Roghoonath Ojha* (1), *Chunder Coomar Mitter v. Sibsundari Dasse* (2), and to section 13, Explanation (1), of the Civil Procedure Code, 1882, and section 11 of the Code of 1908. In the present suit the appellant was entitled to set up the issue of misrepresentation because the judgment of the Judicial Commissioner declared that the appellant's suit had been misconceived.

*B. Dube*, for the respondent, contended that the appellant was estopped from raising the defence in the present suit: Reference was made to *Soorjomonee Dayee v. Suddimund Mohypatter* (3), a case decided on section 2 of the Civil Procedure Code of 1859. The point "finally decided" by the Judicial Commissioner was that the bond could not be avoided as long as the dissolution agreement remained in force; and the appellant now raises substantially the same issue. The respondent, it was submitted, was entitled to the relief granted to him.

*A. M. Dunne* replied.

The judgment of their Lordships was delivered by MR. AMEER ALI. The only point for determination involved in this appeal turns upon the meaning to be attached to the words "finally decided" in section 10 of the British Baluchistan Regulation IX of 1896. That section provides as follows:—

"A Court shall not try any suit in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties in the same rights, or between parties under whom they or any of them claim."

A short statement of the facts will explain how the question has arisen.

The parties to the litigation carried on certain business in British Baluchistan in partnership with

(1) (1881) I. L. R. 7 Calc. 381. (2) (1882) I. L. R. 8 Calc. 631.

(3) (1873) 12 B. L. R. 304; L. R. I. A. Sup. Vol. 212.

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two other men; in July 1910 they agreed to dissolve the partnership; according to the plaintiff, Ganesh Dass' accounts were duly adjusted, when a sum of over 9,900 rupees was found due from the defendant, Ashgar Ali Khan; on the 12th July a formal deed of dissolution was executed by four partners, and on the day following the defendant executed the bond on which the present suit is brought. The defendant's case is that he signed the deed of dissolution which embodied the settlement and executed the bond, agreeing to pay the amount alleged to be due from him, on the fraudulent representation of the plaintiff that the adjustment of accounts was correctly made and on the assurance that should the defendant upon the examination of the accounts at his leisure discover any mistakes they would be rectified. The defendant alleges that it was on the faith of these representations he executed the two documents. He further alleges that some days after the execution of the deed of dissolution and the bond in suit he had an opportunity to examine the statement of account, which he found to be wholly incorrect and misleading, that thereupon he called upon the plaintiff and other partners to make a proper adjustment, undertaking to pay any amount that might on such further examination be found due from him. The plaintiff, Ganesh Dass, refused to accede to the proposal, and thereupon the defendant brought a suit on the 22nd July 1911 in the Court of the Assistant Commissioner of Quetta for a cancellation of the bond of the 13th July 1910, on the ground that he was induced to execute it by the fraudulent representations of the present plaintiff. The written statement of Ganesh Dass is not on the record of this appeal, but it appears from the judgment of the Judicial Commissioner in that case that among other pleas Ganesh Dass urged that the bond being

based on the dissolution deed and being merely executed to record the manner in which the payment of the amount due to him was to be made, a suit for the cancellation of the bond alone would not lie.

The defendant's suit for cancellation of the bond came for trial before the Assistant Commissioner of Quetta, and he held that the defendant, Ashgar Ali Khan, had failed to establish his allegation of fraud. He accordingly dismissed the action, and his judgment was affirmed on appeal by the District Judge on the 30th May 1913.

The defendant thereupon preferred a second appeal under the provisions of Regulation IX of 1896 to the Court of the Judicial Commissioner of British Baluchistan, which is the final Appellate Court in that province. The Judicial Commissioner, Mr. Archer, considered that the objection of Ganesh Dass to the frame of the suit was well founded, and accordingly without entering into the merits of the case, dismissed the defendant's appeal against the orders of the lower Courts dismissing his action.

The Judicial Commissioner gave his decision in the following words, the exact import of which is not disputed. He says first :—

*"Now it appears to me obvious that the respondent's objection to the frame of the suit was wellfounded, and that the plaint should either have been returned for amendment or rejected."*

And then, after commenting on several mistakes in procedure in the Courts below, he proceeds as follows :—

*"I purposely refrain from going in detail into the merits of the case, because they cannot be discussed without bringing in the question of the validity of the dissolution agreement, a matter which is not formally before the Courts. It is sufficient to say that after careful consideration of the record and the pleadings I am not prepared to interfere with the orders of the lower Courts dismissing the appellant's suit, since, for the reasons given above, I hold that the bond of which cancellation is sought is*

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merely consequential on the deed of dissolution of partnership, and that a suit for avoiding the bond cannot succeed as long as the dissolution deed remains in force.”

On the 14th October 1912, the plaintiff, Ganesh Dass, instituted the present suit on the bond executed by the appellant on the 13th July 1910. The defendant denied liability on the ground that it had been obtained from him by the fraud of the plaintiff

It is to be observed that whilst this suit was pending in the Court of the Judicial Commissioner, the defendant brought an action to have the deed of dissolution cancelled, on the ground of fraud, but it was held that it was barred under the Statute of Limitation.

In Ganesh Dass's suit on the bond the Indian Courts have held that the issue raised by the defendant was *res judicata*, and that they were precluded by the provisions of section 10 of Regulation IX of 1896 from entering upon an enquiry whether the bond had been obtained from him on fraudulent representation. In this view they decreed the plaintiff's claim without entering into the merits of the defence. The defendant has appealed to His Majesty in Council, and it is contended on his behalf that the Indian Courts have wrongly applied the rule of *res judicata* to the defence in the present case, as his allegation regarding the execution of the bond on the fraudulent representations of the plaintiff has never been decided in the Judicial Commissioner's Court.

It appears to their Lordships that the contention is well founded. “The matter in issue” in the present suit is no doubt the same as in the defendant's own action. It is clear, however, that although the two first Courts had found against his allegation, the final Court of Appeal refused to determine the issue. Section 10 of the Regulation creates an estoppel by

judgment only when the "matter in issue" has been "finally decided." These words have received judicial interpretation in the case of *Sheosagar Singh v. Sitaran Singh* (1).

In that case the Board had to deal with the identical question of *res judicata* arising under section 13 of the Indian Civil Procedure Code, which, so far as the question under discussion is concerned, is *in pari materia* with section 10 of the Baluchistan Regulation. Lord Macnaghten, delivering the judgment of their Lordships, explained the rule as follows:—

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided.' If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was no decision ought to have been pronounced on the merits."

Their Lordships will therefore humbly advise His Majesty that the judgments of the Courts in India in this case should be set aside and that it should be remitted to the Judicial Commissioner of British Baluchistan to direct a re-trial by the Court of first instance. The respondent will pay the costs of this appeal and of the application made on his behalf on the 19th July 1917; the costs incurred by the parties in India will abide the result.

J. V. W.

*Appeal allowed.*

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *W. W. Box & Co.*

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