

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

GHURSOBHIT AHIR (DEFENDANT) v. RAMDUT SINGH (PLAINTIFF).*

1880
June 8.

Estoppel—Civil Procedure Code (Act X of 1877), s. 13, expl. ii—Defence not raised in previous suit.

Explanation ii of s. 13 of Act X of 1877 was meant to apply to a case where the defendant has a defence which, if he had so pleased, he might, and ought to, have brought forward; but, as he did not bring it forward, the suit has been decreed against him. Under such circumstances the defendant is as much bound by the adverse decree as if he had set up the defence, and he is equally estopped from setting up that defence in any future suit under similar circumstances. The explanation was never intended to enable a party to treat a point of law as having been decided in his favor in a former suit, which was in fact not so decided, and which it was not necessary, for the purposes of the suit, to decide at all.

THIS was a suit brought to recover possession of certain lands held by the defendant under a verbal agreement with the plaintiff, after service of a notice to quit.

The defendant contended that the notice was insufficient; that he had a right of occupancy in the land; and further urged that the plaintiff had brought a suit against him for arrears of rent for the years 1280 to 1284 (1873 to 1877) on the verbal agreement before mentioned, which suit was dismissed, and that therefore the present suit was barred under s. 13 of Act X of 1877.

The Munsif found that the notice was sufficient; that s. 13 did not bar the suit, inasmuch as, in the former suit, the point as to whether the defendant had a right of occupancy was neither tried nor decided, the suit having been dismissed on the ground that the plaintiff had failed to prove the agreement. He further found that the defendant had failed to prove that he had a right of occupancy, and gave the plaintiff a decree for possession.

* Special Appeal, No. 227 of 1879, from a decision of Moulvi Mahomed Nurul Hossain, Subordinate Judge of Shahabad, dated 14th November 1878, affirming a decision of Baboo Bhogobutti Churn Mitter, Munsif of Arra, dated 28th March 1878.

1880
 GHURSOBHIT
 AHIR
 v.
 RAMDUT
 SINGH.

The defendant appealed to the Subordinate Judge, who upheld the decision of the Munsif, and dismissed the appeal with costs.

The defendant then appealed to the High Court.

Mr. *H. E. Mendies* for the appellant.

Baboo *Durga Pershad* for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—We think this is a very clear case. The plaintiff sues to eject the defendant from the property in question, after giving him a proper notice to quit. The defendant sets up a right of occupancy which has been found against him in both the lower Courts, and the only ground upon which he contends that he is entitled to the judgment of the Court, is this. In a former suit between the same parties, in which the plaintiff sued him for rent due under a written agreement, he (the defendant) set up this same right of occupancy; that suit was dismissed because the plaintiff failed to prove the agreement; and, having failed to do so, the other point with regard to the defendant's right of occupancy was neither tried nor decided; it was of course not necessary under the circumstances to decide it.

But the defendant now says that, although that point was neither tried nor decided in the former suit, still, as it might and ought to have been made his ground of defence in that suit, and as he succeeded in that suit, though upon another ground, he is in the same position now, (having regard to expl. ii of s. 13 of Act X of 1877) as if that point had been then decided in his favor.

I certainly do not read expl. ii of that Act as meaning anything so unjust or unreasonable. It is intended to apply to a very different state of things. It says, that "any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly or substantially in issue in such suit."

According to my view this explanation is meant to apply to a case of this kind, where the defendant has a defence, which, if he had so pleased, he might and ought to have brought forward, but as he did not bring it forward, the suit has been decreed against him. The explanation means to say that, under such circumstances, the defendant is as much bound by the adverse decree as if he had set up the defence, and that he is equally estopped from setting up that defence in any future suit under similar circumstances; that appears to me to be the sort of case which expl. ii is intended to meet; it certainly was never intended to enable a party to treat a point as having been decided in his favor in a former suit, which was in fact not so decided, and which it was not necessary for the purposes of the suit to decide at all.

The appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

DURGA PERSHAD (PLAINTIFF) v. ASA JOLAHIA (DEFENDANT).*

Suit for Damages for Personal Injury—Pecuniary Damage—Mofussil Small Cause Courts Act (XI of 1865), s. 6—Jurisdiction of Mofussil Small Cause Courts.

By s. 6 of Act XI of 1865, suits to recover damages for personal injury cannot be brought in a Mofussil Small Cause Court, unless actual pecuniary damage has resulted from the injury. That section excludes from the jurisdiction of the Mofussil Small Cause Courts suits for defamation, infringement of right, and the like, where no actual pecuniary damage has been sustained by the plaintiff, and where the measure of damages to be awarded is often a question of some nicety: but does not exclude suits for actual damages merely because, besides the actual pecuniary loss sustained, the plaintiff asks for something additional for loss of character, or other indefinite injury.

THIS was a suit brought in a Civil Court to recover, as damages, Rs. 104-15 annas on account of costs incurred in certain criminal

* Special Appeal, No. 198 of 1879, from a decision of Baboo Poresh Nath Banerjee, Subordinate Judge of Patna, dated the 1st November 1878, reversing the decision of the Sudder Munsif of that district, dated the 28th February 1878.

1880
GHURBOHIT
AHIR
v.
RAMDUT
SINGH.

1880
June 7.