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witnesses for the appellant nor those for the respondent are alleged to refer to such duty. Nor have they been examined in regard to it. We do not consider that it was regular to rely upon the book without first calling the attention of the parties to it and hearing them as to whether the procedure prescribed therein is an incident of the usage as it obtains in the Walawanad taluk. Notwithstanding these errors of procedure to which we call attention in view to prevent their recurrence, we are of opinion that the decision of the Judge must be supported on the ground already mentioned. We dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

1889. April 12, 13.

RAMIREDDI (DEFENDANT), APPELLANT,

v.

SUBBAREDDI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 13—Res judicata—*Previous suit dismissed as premature.*

A suit by the assignee of a mortgage bond against the mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under s. 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and sued on the bond again:

Held, the claim was not *res judicata* and the second suit was accordingly not precluded by s. 13 of the Code of Civil Procedure.

SECOND APPEAL against the decree of L. A. Campbell, District Judge of Nellore, in appeal suit No. 188 of 1887, confirming the decree of T. Ramachandra Rau, District Munsif of Nellore, in original suit No. 132 of 1886.

The plaintiff sued as assignee of a mortgage bond executed to his assignor by the defendant. He had sued on it before in original suit No. 1102 of 1885 on the file of the District Munsif's Court, but the defendant then pleaded that he had not notice of the transfer, and the District Munsif holding this plea to be valid, dismissed the suit. In the present suit the defendant pleaded that the claim was *res judicata*. The District Munsif, and on appeal the District Judge, held that the claim was not *res*

* Second Appeal No. 1121 of 1888.

judicata because the former suit was dismissed as premature, the cause of action in the view taken by the Court not having then arisen, and decreed for the plaintiff.

The defendant preferred this second appeal.

Sadagopacharyar for appellant.

Mr. *Subramanyam* for respondent.

The following authorities were among those cited in the course of the argument : *Ummatha* v. *Cheria Kunhamed*(1), *Parthasaradi* v. *Chinnakrishna*(2), *Avala* v. *Kuppu*(3), *Watson* v. *Collector of Rajshahye*(4).

The further facts of this case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Wilkinson, J.).

JUDGMENT.—The only question for determination in this appeal is whether the Lower Courts were right in holding that the plaintiff's suit is not barred by the provisions of section 13 of the Civil Procedure Code.

As transferree of a mortgage, the plaintiff instituted original suit No. 1102 of 1885 in the Court of the District Munsif of Nellore to recover the principal and interest due under the mortgage deed. The defendant admitted the execution of the mortgage deed, but pleaded—(1) that the mortgagee had not given him notice of the transfer to plaintiff, and (2) that the assignment was invalid, inasmuch as he had discharged the debt. The Court of First Instance disposed of the case on a preliminary point. Being of opinion that under section 132 of the Transfer of Property Act the transferor himself was bound to give defendant notice of the transfer, and finding that the transferor had given no such notice, the District Munsif dismissed the suit "for want of notice." Plaintiff having caused notice to be given to defendant by the transferor then instituted original suit 132 of 1886. The question of notice was not raised, and the only issues were—(1) was the debt discharged ? (2) is plaintiff's suit barred as *res judicata* ? Both Courts have held that the present suit is not barred by reason of the former decision and the defendant appeals to this Court.

In our judgment the decree of the Courts below is right. To conclude a plaintiff on the ground of *res judicata* it is necessary

(1) I.L.R., 4 Mad., 308.
(2) I.L.R., 5 Mad., 304.
(3) I.L.R. 8 Mad., 77.
(4) 13 M.I.A., 160.

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to show not only that there was a former suit between the same parties, for the same matter, and upon the same cause of action, but also that the matter directly and substantially in issue has been heard and finally decided by the Court which tried the former suit.

In original suit No. 1102 of 1885, the Court of First Instance decided, no doubt erroneously, that the plaintiff had no cause of action. The merits of the case were not gone into, the suit being dismissed because the plaintiff's assignor had not given the notice which, in the opinion of the Court, he was bound to give before his assignee could seek to make the defendant liable. The matter directly and substantially in issue, viz., the liability of the defendant, was not heard and decided in the former suit. As remarked by the Privy Council in the case of *Kali Krishna Tagore* v. *The Secretary of State*(1) "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 is only according to the Code of Civil Procedure "to state the relief granted or other determination of the suit. "The determination may be on various grounds, but the decree "does not show on what ground, and does not afford any inform- "ation as to the matters which were in issue or have been decided." We make these remarks because the appellant's pleader relies on the judgment of this Court in *Avala* v. *Kuppu*(2), in which it was laid down that "it is by the decree and not by the judgment that a question of *res judicata* must be decided." It was held by a Bench of the Calcutta High Court in *Shokhee Bewar* v. *Mehdee Mundul*(3) that a suit on the same cause of action and between the same parties as a former suit which was summarily dismissed without being tried on its merits is not one which has been heard and determined by a Court of competent jurisdiction in a former suit. The decision is in accordance with the remarks of the Privy Council in the case of *Watson* v. *Collector of Rajshahye*(4).

For these reasons, we think the present suit was not barred and dismiss this second appeal with costs.

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(1) I.L.R., 16 Cal., 173.
(2) I.L.R., 8 Mad., 77.
(3) 9 W.R., 327.
(4) 13 M.I.A., 160.