APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

SRI SRI SRI RAMACHANDRA DEO, MAHARAJA OF JEYPORE AND TWO OTHERS (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

1933, January 9.

v.

SUTAPALLI RAMAMURTY AND NINE OTHERS (DEFENDANTS 12 TO 21), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 11—Law—Erroneous decision on question of—Res judicata *if and when—Recurring liability—Prior period—Decision as to*—Res judicata *in suit for subsequent period if.*

Section 11 of the Code of Civil Procedure makes no reference to question of law or to cause of action. Under that section if an issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and if that has been heard and finally decided then the decision on that issue is *res judicata* in the subsequent suit provided the other conditions are fulfilled. Neither the fact that the previous decision was erroneous in law nor the fact that it was given with respect to previous faslis has any bearing on the question whether that decision does or does not operate as *res judicata*.

Sree Rajah Bommadevara Venkata Narasimha Naidu v. *Andavolu Venkataratnam*, (1916) 32 M.L.J. 63; *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*, (1928) I.L.R. 56 Calc. 723, 735 and 736 (F.B.); and *Debi Prasad* v. *Jaldhar Mahton*, (1925) 94 I.C. 553, followed.

APPEAL against the decree of the Court of the Agency Additional District Judge, Waltair, in Original Suit No. 11 of 1924 (Original Suit No. 7 of 1921, Court of the Deputy Commissioner, Ghats Agency).

* Appeal No. 260 of 1926.

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Advocate-General (*Sir A. Krishnaswami Ayyar*) and *B. Satyanarayana* for appellants.

B. Jagannadha Doss for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The plaintiff is the appellant. This appeal arises out of a suit instituted by the plaintiff, the Maharaja of Jeypore, in the Court of the Agency Additional District Judge of Waltair for kattubadi for the years ending 30th June 1918, 30th June 1919 and 30th June 1920. The suit is directed against the mokasadars of the Pachipenta estate and the usufructuary mortgagees from the mokasadars of a portion of the suit mokasa. These usufructuary mortgagees are defendants 12 to 21. These defendants contended that as being mortgagees from the mokasadars there was no privity of contract between them and the plaintiff and that therefore they were not liable for rent payable by the mortgagors. Plaintiff pleaded that these defendants are estopped by the decrees in Original Suit No. 18 of 1913 on the file of the Special Assistant Agent, Koraput, and in Appeal Suit No. 3 of 1916 on the file of the Agent to the Governor, Vizagapatam, from questioning the plaintiff's right to obtain kattubadi from them (Issue 5). The other contentions raised by the parties were not pressed before us. The learned Additional District Judge held that the decisions referred to did not debar the defendants from raising the contention that they are not liable to pay the kattubadi claimed, and he also held that they were not in law liable for the same.

In Original Suit No. 18 of 1913 the Maharaja of Jeypore claimed arrears of kattubadi for certain previous faslis. The main issue fought was the right of the Maharaja to kattubadi. There was no specific issue regarding the liability of the mortgagees to pay the kattubadi. The Assistant Agent decided against the Maharaja. On appeal after remand in Appeal Suit No. 3 of 1916 the Agent decided in favour of the Maharaja and gave him a decree for the kattubadi claimed. Sutapalli Appanna, the predecessor of the respondents, was respondent No. 4 in that appeal. The learned Advocate-General on behalf of the appellant argues that these decisions constitute *res judicata* in the present case and the respondents are precluded from raising their plea of non-liability on the strength of these decisions. Having regard to explanation 4 of section 11, Civil Procedure Code, which says:

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit",

the fact that the plea of their non-liability was not *expressly* raised by the respondents' predecessor may be ignored in deciding the question of *res judicata* and the appeal has been rightly argued by Mr. Jagannadha Doss on behalf of the respondents as if the point was raised specifically and decided against their predecessor. His argument is that the decision in Original Suit No. 18 of 1913 and in Appeal Suit No. 3 of 1916 holding that the mortgagee is liable to pay the rent is an erroneous decision on a question of law and as such cannot operate as *res judicata* when the same question is raised between the same

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parties or their representatives in a subsequent suit. The question for us to decide is whether this argument can be upheld.

In support of his contention the respondent relies on a decision of this Court in *Mangalathammal* v. *Narayanswami Aiyar*(1). In that case it was held that

> " where a purchaser of property at a Court sale purchases it subject to a charge for maintenance, such purchaser cannot, under section 69 of the Contract Act, recover from the owner in whose hands it was so liable,—payments made by him (the purchaser) towards maintenance to prevent the sale of the property."

It was objected that the question was *res judicata* in the plaintiff's, i.e., the purchaser's favour, because in a previous suit she recovered from the defendant money which she had paid in satisfaction of the maintenance charge. There was no dispute that in giving the judgment for the plaintiff in the previous suit the Court had arrived at an erroneous conclusion on a point of law. The learned Judges overruled the contention as to *res judicata* in these words :

> " It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to law.",

provided the decision in the latter case does not in any way question the correctness of the former decree. If this decision lays down the correct law, then there can be no doubt that the respondents' objection should be upheld ; but it has been pointed out in *Sree Rajah Bommadevara*

(1) (1907) I.L.R. 30 Mad. 461.

Venkata Narasimha Naidu v. *Andavolu Venkataratnam*(1), that this decision does not accurately express the law. In that case NAPIER J. who wrote the leading judgment, after an elaborate discussion of the question in the light of the Privy Council decision in *Badar Bee* v. *Habib Merican Noordin*(2) and also the English law, came to the conclusion that

> "where a decision on a point of law whether it be on the construction of a document or of a statute or on common law or on customary law settles a question that arises directly out of conflicting views as to the rights of the parties it is *res judicata*."

SADASIVA AYYAR J. concurred with NAPIER J. and pointed out that WALLIS C.J. in *The Secretary of State for India* v. *Maharajah of Venkatagiri*(3) had clearly changed the view to which he was a party in *Mangalathammal* v. *Narayanswami Aiyar*(4). Shortly stated, in that case the learned Judges pointed out that, if the question of law to be decided was a matter directly and substantially in issue in both suits within the meaning of section 11 of the Code of Civil Procedure, then the previous decision on the question will be *res judicata* in the subsequent suit, provided of course the other conditions relating to *res judicata* are fulfilled. In *Badar Bee* v. *Habib Merican Noordin*(2) the question was whether the point of law, viz., the true construction of a will as to the destination of released funds was *res judicata* by reason of a previous decision on the construction of the testator's will. The previous decision clearly was a pure question of law and

(1) (1916) 32 M.L.J. 63.
(2) [1909] A.C. 615.
(3) (1916) 31 M.L.J. 97.
(4) (1907) I.L.R. 30 Mad. 461.

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their Lordships of the Privy Council held that the question was *res judicata* in these words :

" The decree of 1872 was a decision on the construction of the testator's will as to the destination of funds released from the operation of the trust declared under the sixth clause of the will . . . The result is that it appears that the point raised by this appeal has already been adjudicated on and it is not open to the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal."

Regarding this decision NAPIER J. observed that it is to be noted that the Board drew no distinction between question of law and mixed questions of fact and law. The decision in *Sree Rajah Bommadevara Venkata Narasimha Naidu* v. *Andavolu Venkataratnam*(1) was followed in *Doorwas Seshadri Aiyar* v. *Govindaswami Pillai*(2) by the same Judges when a similar question arose for decision. In this connection attention may also be drawn to the observations of their Lordships of the Privy Council in *Hoystead* v. *Commissioner of Taxation*(3). Their Lordships observed thus :

" It is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.

(1) (1916) 32 M.L.J. 63. (2) (1921) 40 M.L.J. 556.
(3) [1926] A.C. 155, 165.

It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle . . ."

The question was considered recently somewhat elaborately by a Full Bench of the Calcutta High Court in *Tarini Charan Bhattacharya* v. *Kedar Nath Haldar*(1); see pages 735 and 736. In the course of his observations, RANKIN C.J. pointed out that the correctness or otherwise of a judicial decision has no bearing on the question whether it does or does not operate as *res judicata*. It was also pointed out by him that if it is found

> "that the matter directly and substantially in issue in the former suit has been heard and finally decided by such Court, the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of a previous decision can be attacked on a particular point."

This view follows from the language of section 11 of the Code of Civil Procedure and is substantially the view adopted by our own Court in *Sree Rajah Bommadevara Venkata Narasimha Naidu* v. *Andavolu Venkataratnam*(2). The latest decision of the Bombay High Court in *Keshav* v. *Gangadhar*(3) is also to the same effect.

The next argument of Mr. Jagannadha Doss was that, as the present suit is for the recovery of kattubadi from the mortgagees for the years 1918, 1919 and 1920, the decision that they were liable to pay the kattubadi in the previous faslis cannot be treated as *res judicata*, as the causes of action in the two suits are different. In support of this argument reference was made to the decision of the Privy Council in *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*(4)

(1) (1928) I.L.R. 56 Calc. 723 (F.B.).
(2) (1916) 32 M.L.J. 63.
(3) A.I.R. 1931 Bom. 571.
(4) [1926] A.C. 94.

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The question in that case related to the valuation under the Local Government Act, 1919, of New South Wales. There was an adjudication for valuation in a previous year and the question was as to the valuation for the subsequent year. It was argued that the adjudication of the Court for the previous year would be *res judicata* as regards the adjudication for the subsequent years. Lord CARSON rejected the argument with the following observations:

> "The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not *eadem questio*; and therefore the principle of *res judicata* cannot apply."

It was argued that these observations might well be applied to the present case also. The true significance of these observations was pointed out by this Court in *Sankaralinga Nadar Brothers* v. *The Commissioner of Income-tax, Madras*(1) in which case the learned Judges dealt with both the decision in *Hoystead* v. *Commissioner of Taxation*(2) (already referred to) and the decision in *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*(3). Referring to the latter decision the learned Judges stated the following as the principle deducible from it:

> "But if the question is decided by a Court on a reference which depends upon consideration which may vary from year to year, e.g., the case in *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*(3), in which the average valuation had to be taken there can be no question of *res judicata*."

The observations of Lord CARSON in *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*(3) cannot therefore help the respondents

(1) (1929) 58 M.L.J. 260, 272.
(2) [1926] A.C. 155.
(3) [1926] A.C. 94.

inasmuch as it is not and it cannot be alleged that the liability to pay kattubadi in different years depends upon consideration which varies from year to year. It has been decided that

"it is settled law that even if the cause of action for a suit be a recurring one every matter decided in the suit may be *res judicata* which was directly and substantially in issue in the previous suit even though the decision in the former suit be erroneous."

See *Debi Prasad* v. *Jaldhar Mahton*(1). Section 11 of the Code of Civil Procedure makes no reference to question of law or to cause of action. Under that section if an issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and if that has been heard and finally decided then the decision on that issue is *res judicata* in the subsequent suit provided the other conditions are fulfilled. Both on principle and on authority it follows that the arguments that the previous decision was erroneous in law and that it was given with respect to previous faslis have no bearing on the question whether that decision does or does not operate as *res judicata*. We must therefore accept the contention of the learned Advocate-General that the decision in Appeal Suit No. 3 of 1918 by the Agent to the Governor, Vizagapatam, is *res judicata* in the present case and that the respondents-mortgagees are also liable for the kattubadi claimed by the appellant. The decree of the lower Court in so far as it exempts the respondents from such liability is set aside with costs here and in the Court below.

A.S.V.

(1) (1925) 94 I.C. 553.