

1886
 MANGNIRAM
 MARWARI
 v.
 DHOWTAL
 ROY.

has dealt with the case upon that footing, and has given the plaintiff a decree for the immediate payment of the amount of the debt and interest; and as moreover both parties are still content with the case being dealt with on that footing, (subject of course to the question of the rate of interest) we ought not now to change the whole nature of the suit, and send the case back to the first Court to be tried upon a different principle.

Indeed this being a reference to a Full Bench on Regular Appeal, our duty, I consider, is simply confined to answering the question put to us, and when our answer has been given, the Court of Appeal will have to give the final decree.

I think, therefore, it is sufficient to say that the lower Court was not bound to give interest at the rate agreed upon in the mortgage-deed, but was at liberty to give any lower rate of interest it thought proper.

T. A. P.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Cunningham, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Trevelyan.

1886
 March 23.

BROJO BEHARI MITTER (PLAINTIFF) v. KEDAR NATH MOZUMDAR (DEFENDANT).*

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—*Pro-forma defendant.*

A brought a suit against B, claiming certain property as tenant of C, who was also made a defendant in the suit; this suit was on the merits decided in favor of B.

C then brought a suit against B for possession of the same property. *Held*, that such suit was not barred by s. 13 of the Civil Procedure Code.

REFERENCE to a Full Bench made by Mr. Justice Prinsep and Mr. Justice Trevelyan.

In 1880 one Uma Churn Bagdi, claiming to be entitled to possession of a certain tank as tenant of one Brojo Behari Mitter and others, brought a suit to recover possession thereof against Kedar Nath Mozumdar, and Brojo Behari as a *pro-forma* defendant.

* Full Bench Reference on Special Appeal No. 698 of 1885, decided by Baboo Bhubun Chunder Mookerji, Second Sub-Judge of Hooghly, dated 15th January 1885, modifying the decision of Baboo Behari Lal Mookerji, Munsiff of Haripal, dated 17th March 1884.

Brojo Behari appeared by a separate pleader giving evidence in support of the plaintiff's case. By the decree in that suit Uma Churn Bagdi's claim, so far as it related to the share alleged to be held by him as tenant of Brojo Behari Mitter, was dismissed, and it was declared that Brojo Behari Mitter "was not to be deemed the owner of any portion of the pond," and that Kedar Nath Mozumdar "was to be deemed the owner of the share" claimed by Uma Churn Bagdi.

1886
 BROJO
 BEHARI
 MITTER
 v.
 KEDAR
 NATH
 MOZUMDAR.

In 1883, after the termination of the suit above mentioned, Brojo Behari Mitter brought a suit against Kedar Nath Mozumdar, seeking to recover possession of the identical share which, in the previous suit, Uma Churn Bagdi claimed to hold under him.

Both the lower Courts held that this suit (as far as it related to the tank) was barred under s. 13 of the Code of Civil Procedure, relying upon the case of *Bissorup Gossami v. Gora Chand Gossami* (1).

On appeal by the plaintiff to the High Court, Mr. Justice Prinsep and Mr. Justice Trevelyan, doubting the correctness of the decision above mentioned, as it conflicted with the decisions in the cases of *Price v. Khelat Chunder Ghose* (2), and *Nobin Chunder Mozumdar v. Mulka Sundari Dabi* (3), referred to a Full Bench the question whether the suit was barred by s. 13 of the Code of Civil Procedure.

Baboo *Karuna Sindhu Mookerji* for the appellant.— I contend the suit is not barred by s. 13, because (1) the suit is not between the same parties, and (2) nor between parties under whom they or any of them claim. The first suit was between Uma Churn Bagdi and Kedar Nath Mozumdar, Brojo Behari Mitter, the landlord of the plaintiff, being a *pro-forma* defendant; and the present suit is between Brojo Behari Mitter and Kedar Nath Mozumdar.

The case of *Bissorup Gossami v. Gora Chand Gossami* (1), was decided on the authority of *Gobind Chunder Koondoo v.*

(1) I. L. R., 9 Calc., 120.

(2) 5 B. L. R. Ap., 50; 13 W. R., 461

(3) 7 B. L. R. Ap., 38; 15 W. R., 309.

1886
 BROJO
 BEHARI
 MITTER
 v.
 KEDAR
 NATH
 MOZUMDAR.

Taruck Chunder Bose (1), but that case was between the same parties, and is therefore no authority for the decision of *Bissorup Gossami v. Gora Chand Gossami*. Special Appeal 1068 of 1884 decided by Field and O'Kinealy, JJ., on the 26th June 1885, is on all fours with the present case. There the Court did not follow *Bissorup Gossami v. Gora Chand Gossami*, on the ground that the suit was not between the same parties. See also the cases of *Price v. Khelat Chunder G'ose* (2); *Nobin Chunder Mozumdar v. Mookta Soondaree Dabee* (3); *Kalee Kinkur Bachusputty v. Kristo Mungul Bhattacharjee* (4); also *Obhoy Churn Nundee v. Bhoobun Mohun Mozumdar* (5).

Baboo *Troylokho Nath Mitter* for the respondent.—*Bissorup Gossami v. Gora Chand Gossami* (6) is exactly in point. There the *pro-forma* defendant gave evidence in favor of the plaintiff. The cases of *Shadal Khan v. Aminullah Khan* (7); *Gobind Chund Koondoo v. Taruck Chunder Bose* (1); *Deokee Nundun Roy v. Kalee Perrhad* (8) are in my favor.

The opinion of the Full Bench was as follows:—

In our opinion this suit is not barred under s. 13 of the Code of Civil Procedure. No doubt in the former suit the matter now in issue was also in issue and was formally determined, but that suit was not "between the same parties" as this suit "or between parties under whom the parties in this suit claim." The plaintiff is the landlord of the plaintiff in the former suit, and cannot be barred by the decision of that suit, which was between his tenant, a third party, because he was joined as a defendant with that party. It is sufficient to point out that the conduct of the suit was not in his hands; and if it had been abandoned by the plaintiff so as to cause it to be dismissed, it could not reasonably be held that this suit was barred. If this were possible, a person in the position of the plaintiff would be helpless, for he would not be able to re-open the case or to contest the order passed by appeal to a higher Court.

(1) I. L. R., 3 Calc., 146.

(2) 5 B. L. R. Ap., 50; 13 W. R., 461.

(3) 7 B. L. R. Ap., 38; 15 W. R., 309.

(4) 11 W. R., 462.

(5) 12 W. R., 524.

(7) I. L. R., 4 All., 92.

(6) I. L. R., 9 Calc., 120.

(8) 8 W. R., 366.

The judgment of the Full Bench in the case of *Gobind Chund Koondoo v. Taruck Chunder Bose* (1), is not in point. 1886

The suit must therefore be remanded to the lower Appellate Court for trial on its merits. Costs to abide the result.

T. A. P.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Cunningham, Mr. Justice Wilson, Mr. Justice Prinsep, and Mr. Justice Trevelyan.

BHOB SUNDARI DEBI (DEFENDANT) *v.* RAKHAL CHUNDER BOSE
(PLAINTIFF.)*

Mortgage—Foreclosure, Suit for—Mortgage by conditional sale—Regulation XVII of 1806—Transfer of Property Act (IV of 1882), s. 2 (cl. c.) s. 86—Procedure. 1886
March 23.

Where a suit is brought, after the date of the Transfer of Property Act, for the foreclosure of a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act; the procedure of Regulation XVII of 1806 not being saved by s. 2 (cl. c.) of Act IV 1882. *Gunga Sahai v. Kishen Sahai* (2) approved.

Per WILSON, J.—It is a general rule in construing Statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. There is nothing in the Transfer of Property Act from which it can be beyond reasonable doubt concluded that the Legislature intended to depart from this settled principle of legislation.

Per TREVELYAN, J.—There is a clear distinction between “relief” and the mode or procedure for obtaining such relief. The “relief” remains unaffected by a change of procedure. The “rights and liabilities” of a mortgagor and mortgagee, and the “relief” in respect of such rights and liabilities, are the same under Act IV of 1882 as they were before. A different procedure for enforcing such rights and obtaining such relief has however been adopted by the Transfer of Property Act.

REFERENCE to a Full Bench made by Mr. Justice Prinsep and Mr. Justice Trevelyan. The facts were as follows:—

The plaintiff filed on the 18th December 1883 a suit on a mortgage bond, which was in form a mortgage by conditional sale,

* Full Bench Reference on Regular Appeal No. 4 of 1885, decided by the Subordinate Judge of Kulna, dated 11th September 1884.

(1) I. L. R., 3 Calc., 146.

(2) I. L. R., 6 All., 262.