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necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

Adopting this rule and applying it to the present case, it is obvious that the Judge below in dealing with it did not appreciate the distinction to be drawn as indicated above, and that his decison does not meet the difficulties of the position. It seems to us therefore that the proper course for us to adopt is to remand the following issues under s. 566 of the Code for determination :—

1. As to the Rs. 1,200, and Rs. 232 antecedent debts, part of the consideration for the sale to the defendants, have the plaintiffs established that those debts were contracted for immoral purposes, and that at the time the sale was impeached the defendants had notice they were so contracted?

2. As to the Rs. 1,500 paid in cash to Ram Dihal by the defendants, have they proved that they made reasonable and proper inquiries before handing it over, and that they did it believing it was required for the legal necessities of the joint family of which the plaintiffs were members, and that Ram Dihal, as managing member and head, required it for purposes of the joint family?

The findings, when recorded, will be returned into this Court, with ten days for objections from a date to be fixed by the Registrar.

Before Mr. Justice Mahmood and Mr. Justice Oldfield.

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April 28.

MUHAMMAD SALIM (PLAINTIFF) *v.* NABIAN BIBI AND OTHERS (DEFENDANTS). *

Civil Procedure Code, s. 13—*Res judicata—Dismissal of suit under s.* 10, *cl.* ii, *Act VII of* 1870 (*Court Fees Act*)—*Dismissal of suit for misjoinder—Dismissal of suit "in its present form."*

The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed "in its present form" (*ba haisiyat manjuda*), upon two grounds: first, with reference to s. 10 of the Court Fees Act (VII of 1870), that the suit was undervalued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit.

* Second Appeal No. 1366 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 2nd June, 1885, confirming a decree of Maulvi Ahmad-ullah, Subordinate Judge of Azamgarh, dated the 23rd December, 1884.

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Held that the dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res judicata*.

Per MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court-Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose pecuniary burdens or encroach upon, or qualify the rights of, the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. S. 10 is simply a penal clause to enforce the collection of the court-fees, and dismissal of a suit under its provisions cannot operate as *res judicata*.

Also *per* MAHMOOD, J.—The condition in s. 13 of the Civil Procedure Code, that the former suit must have been "heard and finally decided", means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Ramnath Roy Chowdhry* v. *Bhagbut Mohaputter* (1), *Shekhee Bewah* v. *Mehdee Mundul* (2), *Dullabh Jogi* v. *Narayan Lakhu* (3), *Pungrav Earji* v. *Sidhi Mahomed Ebrahim* (4), *Fateh Singh* v. *Lachmi Kooer* (5), *Roghoonath Mundul* v. *Juggut Bundhoo Bose* (6), and *Saikappa Chetti* v. *Rani Kulandapuri Nachiyar* (7) referred to.

Also *per* MAHMOOD, J.—The words *ba kaisiyat mazjuda* must be taken as amounting to a permission to the plaintiff to bring a fresh suit, within the meaning of s. 373 of the Civil Procedure Code, and could only mean that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by chapter XXII of the Code is not the only manner in which a plaintiff can come in to Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. *Ganesh Rai* v. *Kalka Prasad* (8) dissented from. *Watson* v. *The Collector of Rajshahye* (9) and *Salig Ram* v. *Tirbhawan* (10) referred to.

The facts of this case are stated in the judgment of Mahmood, J.

Mr. *C. H. Hill* and Mr. *Abdul Majid*, for the appellant.

Maulvi *Mehdi Hasan* and Lala *Jokhu Lal*, for the respondents.

MAHMOOD, J.—I accept the argument addressed to us by Mr. *Abdul Majid* on behalf of the appellant, and I would decree this appeal, and, setting aside the decisions of both the lower Courts, remand the case to the Court of first instance for trial on the

(1) 3 W. R., Act X Rul. 140.
(2) 11 W. R., 327.
(3) 4 Bom. H. C. Rep., A. C., 110.
(4) I. L. R., 6 Bom. 482.
(5) 13 B. L. R., Ap. 37.
(6) I. L. R., 7 Calc. 214.
(7) 3 Mad. H. C. Rep. 84.
(8) I. L. R., 5 All. 595.
(9) 13 Moo. I. A. 160.
(10) Weekly Notes, 1885, p. 171.

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merits. I will state my reasons for coming to this conclusion. The facts of the case, so far as they are necessary for the disposal of this appeal, are these.

Muhammad Salim, the plaintiff-appellant, purchased the property in suit from Musammat Nabian, under a deed of sale executed on the 4th September, 1871, but being probably unable to secure possession of the property, he brought a suit against the vendor and others, who are included as defendants in this suit. On the 9th November, 1872, that suit was dismissed on the ground of misjoinder, and also because the suit was under-valued, and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court. In the order of dismissal there is no reference to s. 10 of the Court-Fees Act (VII of 1870). The words used are:—"The claim of the plaintiff in its present form is dismissed with costs;" and I think the learned pleader for the respondent has rightly argued that the order must be taken to have been passed under the section above mentioned. From this order an irregular sort of miscellaneous appeal was preferred by the plaintiff, but the appeal was dismissed on the 12th April, 1873, when that litigation terminated. Matters stood thus until the 9th September, 1884, when the present suit was instituted by the same plaintiff, in respect of the same property, against the same defendants, and practically with the same object as the former suit. The suit has been resisted by the defendants, who, *inter alia*, pleaded that the suit was barred *in limine*, and in support of this plea they relied mainly upon the rule of *res judicata* as enunciated in s. 13 of the Civil Procedure Code. The plea has been accepted by both the lower Courts, and they have concurred in dismissing the suit without going into the merits.

The learned counsel for the appellant contests this view of the law in the argument which he has addressed to us, and he contends that there has been no real adjudication of the rights of the parties, and therefore neither the plea of *res judicata* nor any other plea in bar of the action applies to the case. I accept this contention. It is a fundamental rule of law that where there is a right there is a remedy—*ubi jus ibi remedium*; and the operation of this maxim cannot be defeated, unless the plaintiff has already had his remedy, or

the remedy is barried by some clear and positive rule of law. Here the plaintiff asserts that by his purchase of the 4th September, 1871, he has become the owner of the property for which he sues, and if this assertion is true, he has his *jus*, and is entitled to his remedy, which, of course, cannot be granted without a proper adjudication of the merits of his title. There has clearly been no such adjudication in this case, and indeed the learned pleader for the respondents virtually concedes that the judgments of the lower Courts can be supported only upon the ground of the application of s. 13 of the Civil Procedure Code to this suit, though he has also attempted to rely upon other provisions of the law, and especially upon cl. ii of s. 10 of the Court-Fees Act, and contends that the expression in the Munsif's order that the suit was dismissed "*ba haisiyat manjuda*," that is, in the form in which it was brought, will not prevent the operation of the plea of *res judicata*.

It seems to me that much misapprehension prevails in the Mufassal in regard to pleas which bar an action *in limine*, and I may take this opportunity of expressing my views upon the subject as briefly as I can, especially as they will dispose of the whole argument pressed upon us by the learned pleader for the respondents. The rule that no one ought to be harassed twice, if it be clear to the Court that it is for one and the same cause—*nemo debet bis vexari, si constat curiæ quod sit pro unâ eâdem causâ*—is only a rule of adjective law or procedure which operates as a qualification or limitation of the maxim *ubi jus ibi remedium*, which I have already quoted. The maxim is the basis of the rule of *res judicata*, which was so fully considered in the celebrated case of the *Duchess of Kingston* (1) by Sir William De Grey, C. J., who delivered the unanimous judgment of the learned Judges in that case. The rule explained there has never been materially altered, and I look upon s. 13 of our own Civil Procedure Code as a reproduction of the old rule of law. Now the argument of the learned pleader for the respondents has left the impression upon my mind that he contended that the mere dismissal of a suit will, because it is a decree, operate as *res judicata*. This is not so. Judgments, orders or decrees which operate in bar of the action have been provided for by s. 40 of the Evidence Act (I of 1872), which makes

(1) 2 Smith's L. C., 8th ed., p. 734.

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them relevant and thus admissible in evidence. But that section comprehends a vast class of such proceedings which cannot be confounded with the rule of *res judicata*. For instance, we have in the Civil Procedure Code itself the provisions in ss. 43, 103, 244, 317, 371, 373, which, though barring an action *in limine*, must not be confounded with the rule of *res judicata* as enunciated in s. 13 of the Code. On the other hand, it is not every dismissal, though incorporated in a decree, that will operate in bar of a second action; and illustrations of this are to be found in ss. 99 and 99*A* of the Code itself, which permit a fresh suit in express terms. I have said all this in order to show that it is not every decree or judgment which will operate as *res judicata*, and that every dismissal of a suit does not necessarily bar a fresh action.

Now the question is whether the dismissal of the plaintiff's former suit under s. 10 of the Court-Fees Act can be regarded as *res judicata* barring the present action. The next question is, whether the dismissal of a suit for misjoinder would have any such effect; and lastly, the question is whether the dismissal of the suit "*ba haisiyat maujuda*," that is, in the form in which it was brought, which occurs in the Munsif's order in the former suit dated the 9th November, 1872, has any bearing upon the question. I have enumerated these points because they distinctly arise from the contention of the learned pleader for the respondents, and I will deal with them *seriatim*.

First, then, I have no doubt whatsoever that the dismissal of a suit under cl. ii, s. 10 of the Court-Fees Act can never operate as *res judicata* so as to bar a fresh action, where the plaintiff has valued his claim rightly and has paid adequate court-fees. The section begins by laying down the rule that if a suit has not been properly valued, "the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or net profits been rightly estimated." And then comes cl. ii, with which we are concerned:—"In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." Now what I wish to say in the first place is that the object of these provisions, as indeed of the whole

Act, is to lay down rules for the collection of one form of taxation, and this I regard to be the scope of the enactment, though it contains no preamble at all : and I hold it as a fundamental rule of construction that statutes which impose pecuniary burdens, or encroach upon the rights of the subject, or qualify those rights must be construed strictly. The rule applies with especial force to such provisions as provide a penalty, whatever it nature may be. These rules which are applied by Courts of Justice in England to Acts of Parliament are too well recognised to require any citation of authorities, and I hold that they are in the main applicable to the interpretation of the enactments of the Indian Legislature. This being so, I am of opinion that the dismissal of a suit under s. 10 of the Court-Fees Act is intended to be simply a penal clause to enforce the collection of the court-fees, and that if such dismissal is sought to operate as a plea barring a fresh action *in limine* as *res judicata*, we must look elsewhere in the statute-book. The learned pleader for the respondent points to s. 13 of the Civil Procedure Code in support of his contention. But the rule there laid down expressly renders its application subject to the all-important condition that the former suit "has been *heard* and *finally decided*." Now, it is not necessary for me to enter into an elaborate explanation as to what these words mean, for, as far back as 1865, two learned Judges of the Calcutta High Court, in *Ramnath Roy Chowdhry* v. *Bhagbut Mohaputter* (1), laid down the rule that a former judgment proceeding wholly on technical defect or irregularity, and not upon the merits, *is not a bar to a subsequent suit for* the same cause of action. Again, another Bench of the same Court, in *Shokhee Bewah* v. *Mehdee Mundul* (2), held 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 on a cause of action which "has been heard and determined by a Court of competent jurisdiction in a former suit," and that the latter suit would therefore not be barred. To come closer to the point now before us, we have the judgment of Couch, C. J., in *Dullabh Jogi* v. *Narayan Lakhu* (3), where the suit had been dismissed on the ground of improper valuation, and where it was

(1) 3 W. R., Act, X Rul. 140. (2) 11 W. R., 327.
(3) 4 Bom. H. C. Rep., A. C., 110.

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held that such dismissal would not operate as *res judicata*, barring a subsequent suit. It is true that these rulings were passed before either the present Civil Procedure Code or the Court-Fees Act existed; but I hold that even under the present law they are applicable to cases like the present. Indeed, the judgment of Latham, J., in *Rungrav Ravji* v. *Sidhi Mahomed Ebrahim* (1), is a very recent authority, and there is much in the *ratio decidendi* there adoped which supports my view, though the exact point with which I am now dealing was not decided. Then as to the question of dismissal of the former suit on the ground of misjoinder or multifariousness, I need only cite *Fateh Singh* v. *Lachmi Kooer* (2), which is an authority for saying that such a dismissal does not operate as *res judicata*. I may also cite *Roghoonath Mundul* v. *Juggut Bundhoo Bose* (3) in support of my view.

It remains for me now only to deal with the third point upon which the argument on behalf of the respondent has proceeded. It is true that in the case of *Ganesh Rai* v. *Kalka Prasad* (4) two learned Judges of this Court held that the dismissal of the former suit "in the form it was brought" did not amount to permission to sue again, contemplated by s. 373 of the Civil Procedure Code, and such dismissal must be regarded as a "decision" thereof in the sense of s. 13, *Explanation III*, and therefore as a bar to the fresh suit. The words in the original decree in that case appear to have been the same as here—*i. e.*, the claim was dismissed "*ba haisiyat manjuda*," and no doubt much would depend upon the interpretation of these words. With due deference to the learned Judges who decided that case, I confess I am unable to accept the view of the law there enunciated. The report of the case shows that the former suit had been dismissed on the ground that the plaintiff had not filed his certificate of sale with the plaint, that is to say, for a purely technical irregularity with reference to the rule contained in s. 59 of the Civil Procedure Code. The suit had not been tried upon its merits, and the Munsif took care to qualify his decree by dismissing the suit "*ba haisiyat manjuda*," which cannot, in my opinion, be dealt with as nugatory in interpreting that decree; and if proper effect is given to such words, they can have

(1) I. L. R., 6 Bom. 482.
(2) 13 B. L. R., Ap. 37.
(3) I. L. R., 7 Calc. 214.
(4) I. L. R., 5 All. 595.

only one meaning, namely, that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. Whether such a qualified decree was right or wrong is another matter; but if it was wrong, it might have been a proper subject of complaint on the part of the defendant, against whom the suit was dismissed only as then brought, and he might possibly have taken measures, either by way of review or appeal, to make the decree final in the sense of the dismissal being upon the merits of the claim and not upon technical grounds of form; and if he did not take such measures, the decree must be taken as it stands, unless indeed the circumstances of the case showed that it was in reality a decree dismissing the suit after adjudication of the rights of the parties. But it was not so; and I cannot interpret such a decree as having the force of a final adjudication upon the merits of the issues raised between the parties, so as to operate as *res judicata* when a suit is instituted in proper form and the rights of the parties have to be adjudicated upon. Further, I am not prepared to accept the view upon which the judgment of the learned Judges in the case cited seems to proceed, to the effect that the procedure provided by Chapter XXII of the Civil Procedure Code is the only manner in which a plaintiff can come into court for the second time to ask for adjudication upon the merits of his rights—merits which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. Nor can I hold that *Explanation III* of s. 13, Civil Procedure Code, upon which the learned Judges in that case relied, would have any bearing upon a case such as the present. What really happened in this case was, that the Munsif in dismissing the suit "*ba kaisiyat maujuda*"—in the form in which it was brought—adopted a course long known to the Mufassal Courts in this country under the somewhat inaccurate name of "*non-suit*"—a state of things to which the Lords of the Privy Council referred in *Watson* v. *The Collector of Rajshahye* (1), which is the leading case upon the subject, and in which the former suit was dismissed by a decree which reserved to the plaintiff the right to bring a future suit.

(1) 13 Moo. I. A. 160.

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Their Lordships, after stating the law as it then stood, made following observations with reference to the reservation contained in the former decree :—

"It has been argued that that decree, not having been appealed against by the respondents in the original suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court, in a case in which the former decree had been pleaded as *res judicata*, and which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case."

These observations leave no doubt in my mind that we can in this litigation examine the decree of the 9th November, 1872, in order to satisfy ourselves as to whether that decree can be properly pleaded as *res judicata* barring the present suit. But, as I have already said, that decree disposed of the suit upon the ground of purely technical defects, which in a just juridical sense cannot be regarded as a final adjudication upon the rights of the parties, so as to furnish a basis for application of the plea known in the Roman law under the name of *exceptio rei judicatæ*, which is the foundation of the rule incorporated in s. 13 of our own Civil Procedure Code. And interpreting that section as I do, I adopt the language used by the learned Judges of the Madras High Court in *Saikappa Chetti* v. *Rani Kulandapuri Nachiyar* (1), when I say that to conclude a plaintiff by a plea of *res judicata*, it is not sufficient to show that there was a former suit between the same parties, for the same matter, upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Res judicata dicitur quæ finem*

(1) 3 Mad. H. C Rep. 84.

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controversiarum pronuntiatione judicis accepit, quod vel condemnatione vel absolutione contingit (Dig. XLII, Tit. I. Sect. I). The case of *Ganesh Rai* v. *Kalka Prasad* (1), already referred to, ignores this fundamental principle of law; and this is not the first occasion upon which my learned brother Oldfield and myself have expressed our dissent from that ruling; and we did so before in a case [*Salig Ram* v. *Tirbhavan* (2)], in which the point for determination was very similar to this case.

For these reasons my order in the case is that this appeal be decreed, that the decrees of both the lower Courts be set aside, and that the case be remanded to the Court of first instance under s. 562, Civil Procedure Code, for trial upon the merits. Costs to abide the result.

OLDFIELD, J.—I concur in the order of remand.

Case remanded.

FULL BENCH.

1886
May 3.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* MADHO.

Prosecution, withdrawal from—Government Pleader—Public Prosecutor—Criminal Procedure Code, s. 494.

Held by the Full Bench that a person appointed by the Magistrate of the District, under s. 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494.

THIS was a reference to the Full Bench. The point of law referred is stated in the order of Brodhurst, J., by whom the reference was made.

BRODHURST, J.—I called for the record of this case on perusal of the Sessions statement of the District of Cawnpore for the month of December, 1885.

(1) I. L. R., 5 All. 595. (2) Weekly Notes, 1885, p. 171.