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JAMUN v. NAND LAL.

In our opinion the interpretation of the meaning of 'statement of account' given by Mr. Justice West in *Nahanibai* v. *Nathu Bhau* (1), which was followed in *Tribhovan Gangaram* v. *Amina* (2), is correct, and we need add nothing to the explanation and reasons stated in the earlier of these two rulings. It comes to this that the plaintiff is suing for the recovery of items which the first Court held were barred by limitation, and to which we find no objection was taken by way of appeal to the second Court. We must therefore take it as a matter of fact that these items were so barred.

In this view of the case we think that the Court of the first instance held rightly that the plaintiff's suit was barred by limitation. We decree the appeal, and setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs in all the Courts.

Appeal decreed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

1892. *June* 27.

INDARJIT PRASAD AND OTHERS (PLAINTIFFS) *v.* RICHHA RAI (DEFENDANT).*

Civil Procedure Code, s. 13—*Res judicata—Finding in judgment in conflict with terms of decree.*

The decree in a suit gave the plaintiff an unrestricted right to the property claimed by him, but in the judgment on which that decree was based it was stated, the finding apparently not being a finding on any material issue in the suit, that the defendants were entitled to certain rights in respect of the property decreed to the plaintiff. No application was made to bring the decree into conformity with the judgment, and the decree as it stood was affirmed on appeal. *Held* that the defendants, as plaintiffs in a subsequent suit between the same parties relating to the same property, could not plead the finding in their favor in the judgment as constituting *res judicata* in the face of the clear wording of the decree.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellant.

Babu *Bishnu Chandra Moitra*, for the respondent.

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* Second appeal No. 1235 of 1889 from a decree of Rai Kulwant Prasad, Subordinate Judge of Azamgarh, dated the 4th July 1889, confirming a decree of Maulvi Munir-ud-din Ahmad, Munsif of Muhammadabad, dated the 7th February 1889.

(1) I. L. R., 7 Bom., 414. (2) I. L. R., 9 Bom., 516.

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INDARJIT PRASAD v. RICHHA RAI.

EDGE, C. J., and KNOX, J.—The only question in this second appeal is as to whether s. 13 of the Code of Civil Procedure applies. In a former suit the defendant in this Court was plaintiff and the plaintiffs in this suit were defendants. In this suit the plaintiffs claim one-half of the value of the produce of certain trees and one-half value of the wood of such of these trees as are cut down. It was found by the lower appellate Court that they had not established their right to the half value. The plaintiffs, however, in this suit rely on s. 13 of the Code of Civil Procedure. Now in the former suit the plaintiff, defendant here, sued for proprietary possession of these trees and to establish his proprietary and exclusive right to these trees on the basis that the defendants, plaintiffs here, never had any title to the trees at all. In the former suit the Munsif gave the plaintiff, defendant here, an unlimited decree decreeing his claim, *i. e.*, the Munsif decreed the claim for possession and for title as prayed, but in his judgment the Munsif had stated that the then plaintiff's possession of the trees would be subject to the defendants' right to half the value of the produce and half the value of the timber. That case went to appeal and objections under s. 561 of the Code of Civil Procedure were filed in the lower appellate Court. The Munsif had not found any issue directly raising the question as to whether the then defendants were entitled to any part of the produce or any part of the timber of the trees, although he had found a general issue as to whether the then plaintiff was entitled to the trees. In the appeal in that suit, the then plaintiff, who was respondent, by his objection under s. 561 questioned the statement in the Munsif's judgment that the defendants in that suit were entitled to a moiety of the produce and a moiety of the timber. The result was that the appellate Court dismissed the appeal and disallowed the objections, affirming consequently the decree of the Munsif. Now the question arises:—how does s. 13 of the Code of Civil Procedure apply in such a case? On the one hand, the defendant here has a decree in the former suit confirmed in appeal entirely in his favor, showing, so far as a decree can, that he had exclusive right and title to the trees, for that was decreed to him. On the other hand, the plaintiffs

here have a passage in the judgment of the first Court in the former suit that they were entitled to half of the produce and half of the timber of the trees. Now if the decree was at variance with the judgment an application ought to have been made to bring the decree into accordance with the judgment. That decree as it stands is a decree unlimited as to the now defendant's possessory right and title, and it appears to us that when there is an apparent conflict between a decree which is specific and clear in its terms and a statement of fact in the judgment upon which that decree was based, which, if material, was inconsistent with the decree, we must pay attention to the decree as it stands in preference to the statement of facts. This case is quite distinct from the case of *Kali Krishna Tagore* v. *The Secretary of State for India in Council* (1). The decree in the former suit there was that in that suit the plaintiff was not entitled to the relief sought. That was not a decree which, having regard to the judgment, finally and for ever settled the question of title as between the litigants; it was more like a decree to the effect that the plaintiff's then suit was premature. We have no doubt that in every case where the application of s. 13 is in question it is not only necessary to look at the decree but at the judgment. Many immaterial issues may be raised and fought out in a case which an examination of the record would prove to have been absolutely immaterial. In our opinion s. 13 was never intended to bar the trial of a material issue in a suit, because the Judge in a previous suit where that question was absolutely immaterial had tried the question and given an opinion upon it. There are also cases in which the decree possibly alone could not be understood without an examination of the pleadings, of the issues and of the judgment, but in all these cases the decree is the final judicial determination of the suit, and in our opinion if a decree is specific and is at variance with a statement in the judgment on which it is founded, it is the decree to which we must pay attention and not to the statement in the judgment. The decree and not the statement in the judgment must be taken on matters which are material

(1) L. R. 15, I. A. 186.

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to the final determination of the Court on the subject; otherwise you might have a man lawfully in possession under a decree declaring his title to possession and you might have his opponent still entitled by reason of a statement in the judgment on which that decree was passed to question the title of the man in possession. We consequently hold that, so far as s. 13 of the Code of Civil Procedure applies, the plaintiffs, and not the defendant here, are barred by the former suit. We dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1892
June 30.

Before Mr. Justice Tyrrell and Mr. Justice Blair.

QUEEN-EMPRESS *v.* BANKHANDI.

Practice—Sessions trial—Witness—Rejection by Court of Sessions of witnesses sent up by the committing Magistrate.

It is the duty of a Sessions Court to examine all the witnesses sent up by the committing Magistrate. That Court is not justified in rejecting any of the witnesses so sent up unless it has good reason to believe that such witness came into the Court house with a predetermined intention of giving false evidence.

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

The Public Prosecutor (The Hon'ble Mr. *Spankie*) for the crown.

The appellant was not represented.

TYRRELL AND BLAIR, JJ.—Bankhandi appeals against his conviction and sentence to death for murder. His case also comes before us for confirmation of sentence.

On the 11th February 1892, between 9 A.M. and noon, the appellant's wife was nearly decapitated with a hatchet, the property of and found in the house of the appellant. It was covered with blood. The only question in the case is whether Bankhandi, appellant, in a fit of rage, because his wife quarrelled with him about money lost in gambling, murdered her with the axe, or whether, as Bankhandi from the moment of the crime down to the end of his