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as essential, the rule will ordinarily be treated as a direction only. "Where," writes Sir P. B. Maxwell (*Maxwell on the Interpretation of Statutes*, 2nd Edition, p. 459), "the prescriptions of a statute relate to the performance of a public duty, and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature, they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal in deed, but it does not affect the validity of the act done in disregard of them." In this instance the plaint was originally filed in the Court of the Munsif, but it was returned by the Munsif to be presented in the Court of the Subordinate Judge. To send the plaintiff back at this stage of the proceedings to the Munsif's Court would surely be most inequitable.

My answer then to the question put to the Full Bench must be that the refusal of the District Judge to entertain the plea of defect in jurisdiction, in the circumstances stated, is not, in my opinion, erroneous, but correct.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

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December 13.

SHEORAJ RAI (PLAINTIFF) *v.* KASHI NATH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, ss. 13, 45—Res judicata—Matter directly and substantially in issue—Meaning of "suit" in s. 13.

S sued *K* for four bonds, alleging that the same had been satisfied. *K* had formerly sued *S* on two of these bonds. *S* had alleged in defence of that suit that those two bonds, as also the other two, had been satisfied. It was decided in that suit that not one of the bonds had been satisfied.

Held by PETHERAM, C. J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ., that the only issue in the former suit which had to be decided being whether the bonds on which that suit was brought had been satisfied or not, the second suit was, under s. 13 of the Civil Procedure Code, *res judicata* only in respect of those bonds, and not in respect of the other two bonds.

The Court which tried the former suit had not jurisdiction to try the subsequent suit.

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* Second Appeal No. 167 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 15th December, 1883, affirming a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 21st March, 1883.

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Per MAHMOOD, J.—This being so, if the word "suit" in s. 13 were taken literally, it might, with some plausibility, be contended, that there was no *res judicata* in respect of any of the bonds. The word "suit," however, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit.

Adopting this interpretation, it was clear that the two bonds which were the subject of the former suit could not be allowed to form the subject of litigation again.

As to the other two bonds, which were not the subject-matter of the former suit, they did not, in the former suit, constitute a "matter directly and substantially in issue," within the meaning of s. 13; and even if they were "directly and substantially in issue," the decision in the former suit would not support the plea of *res judicata*, because the Court which tried that suit was not a Court of jurisdiction competent to try the subsequent suit in which the plea was raised.

THE plaintiff in this case sued the defendants for the delivery of four bonds, two dated the 7th Pus Badi 1285 fasli, and the other two dated, respectively, the 12th Pus Badi and the 3rd Chait Badi 1285 fasli. He claimed on the ground that the bonds had been paid. It appeared that the defendants had formerly sued the plaintiff on the two bonds dated the 7th Pus Badi 1285 fasli. The plaintiff had set up as a defence to that suit that he had paid those bonds as well as the other two bonds, dated, respectively, the 12th Pus Badi and the 3rd Chait Badi 1285 fasli. The Court by which that suit was heard (Munsif) fixed as a point for decision "whether the bonds in suit and other bonds have been satisfied or not." On this point it decided that the plaintiff had not paid the defendants anything in respect of the bonds, and it gave the defendants a decree. This decree was affirmed by the Subordinate Judge on appeal.

The defendants set up as a defence to the present suit, *inter alia*, that the question whether the bonds had been paid was *res judicata*. Both the lower Courts allowed this defence.

In second appeal the plaintiff contended in his memorandum of appeal that, inasmuch as the value of the subject-matter of the present suit exceeded the pecuniary limits of the jurisdiction of the Court which decided the former suit, nothing which that Court decided could operate in the present suit as *res judicata*. The Divisional Bench (MAHMOOD and DUTHOIT, JJ.) hearing the appeal

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referred the case to the Full Bench, the order of reference being as follows :—

"The suit from which this appeal has arisen was instituted in the Court of the Subordinate Judge, with the object of recovering four bonds executed at different times by the plaintiff in favour of the defendants. The suit was valued at Rs. 2,025, and the allegation upon which the suit was based was, that the plaintiff had already liquidated the debts to which the bonds related.

"It appears that on a former occasion the defendants had sued the plaintiff on two of the bonds now in question, and had obtained a decree on the 11th March, 1882, from the Court of the Munsif, who, with reference to the valuation of that suit, had jurisdiction to decide that case. In that case the plaintiff had set forth in defence the same allegations as those on which he has now come into Court, and the issue raised in that case was identical with the one raised in this suit. The issue was in that case decided against the plaintiff by the Munsif, and the judgment was upheld in appeal by the Subordinate Judge on the 27th July, 1882.

"The Subordinate Judge, whilst holding that the present suit was barred by reason of the judgments in the former litigation, entered into the merits of the case, and dismissed the suit. On appeal, the learned District Judge upheld the decree, and declined to enter into the merits, holding that the suit was barred by s. 13 of the Civil Procedure Code, and for this view he has relied upon the ruling of this Court in *Pahlwan Singh* v. *Risal Singh* (1) and the ruling of the Calcutta High Court in *Run Bahadoor Singh* v. *Lucho Kooer* (2).

"The plaintiff has preferred this second appeal, and Mr. *Conlan*, who has appeared on his behalf, contends that the former suit having been disposed of by the Munsif, the finding in that case could not operate as *res judicata*, so as to bar the present suit, the valuation of which exceeds the jurisdiction of the Munsif. In support of his contention, the learned counsel cites the recent Privy Council ruling in the case of *Misir Raghobardial* v. *Sheo Baksh Singh* (3).

"The point raised in this case is, no doubt, of considerable importance and involves much difficulty. The ruling of this Court

(1) I. L. R., 4 All., 55. (2) I. L. R., 6 Calc., 406.
(3) I. L. R., 9 Calc., 439; L. R., 9 Ind. Ap., 197.

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in the case of *Pahlwan Singh* does not appear to have much application to this case, because the Court which had decided the former suit was competent to try the subsequent suit wherein the plea of *res judicata* was raised. In the present case the Court which decided the former suit was the Court of the Munsif, who, by reason of the pecuniary limits of his jurisdiction, would not have been competent to entertain the present suit. The ruling of the Calcutta High Court, cited by the learned District Judge, is, however, applicable, and supports the view of the law taken by him. But the rule laid down in that case militates against the ruling of the Privy Council cited by Mr. *Conlan*. In that case their Lordships, in interpreting s. 13 of the Civil Procedure Code (Act X of 1877), held that the words "Court of competent jurisdiction" included the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the subsequent suit wherein *res judicata* was pleaded as a bar, and that before the plea could hold good the two Courts must possess jurisdiction concurrent as regards the pecuniary limit as well as the subject-matter.

"In considering the question it is important to notice that the body of s. 13 of the Civil Procedure Code of 1877 has re-appeared in a modified form in the present Code, and the change of diction is very considerable. As the section stands, it would seem that no adjudication can form the basis of the plea of *res judicata*, unless the Court which decided the former suit would be competent to decide the suit in which the plea is raised. In the present case, out of the four bonds to which the suit relates, two have already been the subject of adjudication by the Court of the Munsif; but that Court would not be competent to try the present suit. The question then is, whether the present suit, at least so far as it relates to the two bonds, is not subject to the rule of *res judicata*? The language of s. 13 of the present Code is so general that it seems doubtful whether it is not applicable to the present case. We feel, however, some difficulty in adopting such a view. The present suit, as a whole, is undoubtedly beyond the pecuniary limits of the Munsif's Court, but it is so because the plaintiff, availing himself of the provisions of s. 45 of the Civil Procedure Code, has joined several causes of action, and has thus included

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in the suit the two bonds already adjudicated upon in the former suit in the Munsif's Court.

"In view of these considerations we refer the following questions to the Full Bench :—

"Is the present suit wholly or partially governed by the rule of *res judicata*, by reason of the former adjudication between the parties ?"

Mr. *T. Conlan* and Munshi *Sukh Ram*, for the appellant.

Mr. *C. Dillon* and Munshi *Kashi Prasad*, for the respondents.

Mr. *T. Conlan*.—The decision of the Munsif in respect of the bonds on which the suit in his Court was brought cannot affect the bonds in respect of which there was no claim in his Court. [MAHMOOD, J.—Do you not contend that, even in respect of the bonds that were sued on in the Munsif's Court, there is no *res judicata*, inasmuch as the Munsif could not have tried the present suit in respect of all the bonds?] No; I do not. I confine my argument to the bonds which were not sued on in the Munsif's Court.

Munshi *Kashi Prasad*.—There was an appeal from the Munsif's decree; the Subordinate Judge affirmed his decision. Even if the Munsif was not competent to try the present suit, the appellate Court was. Therefore there exists everything which goes under s. 13 of the Civil Procedure Code to make a matter *res judicata*. [DUTHOIT, J.—The matter as to the bonds not in suit was not "directly" in issue.] The issue framed by the Munsif shows that that matter was "directly" in issue.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—We are all agreed that the District Judge is wrong in holding that there is *res judicata* as regards the whole of the suit. The difficulty has arisen from a misconception as to what was in issue in the former suit and what was alleged in evidence in that suit. The only issue in that issue was, whether the two bonds sued on had been satisfied. To prove this the defendant adduced evidence showing that all the bonds had been satisfied. The Munsif found that the defendant had not paid anything. But the only question which the Munsif had to decide was, whether the

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two bonds sued on in his Court had been paid. The answer to the reference should therefore be that the suit, as regards those bonds, is *res judicata*, but not as regards the other bonds.

OLDFIELD and BRODHURST, JJ., concurred.

MAHMOOD, J.—The point raised by the argument of the learned counsel for the appellant is simple, and I am anxious to explain that I should not have been a party to the reference had I not thought that his contention before the Divisional Bench was that the plea of *res judicata* was not applicable in respect of any of the bonds. The question now seems to be confined to the bonds which were not the subject of the former suit, and in determining the question I only wish to add a few words to what the learned Chief Justice has already said. The rule of *res judicata* is regulated in this country by the language of s. 13 of the Civil Procedure Code. The body of that section is thus worded :—"No Court shall try any suit or 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, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." There can be no doubt that all the bonds are subject of dispute in the present suit, and it is obvious that the Munsif who disposed of the former suit is not "a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised," within the meaning of the section. It seems to me, therefore, that if the word "*suit*" were taken literally, it might with some plausibility be contended that there is no *res judicata* in respect of any of the bonds. In my opinion the word "*suit*," as it occurs in s. 13, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit. Adopting this interpretation, it is clear that the two bonds which were the subject of the former suit cannot be allowed to form the subject of litigation again; and the circum-

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stance that the plaintiff has joined them in the present litigation will not enable him to obviate the plea of *res judicata*.

As to the rest of the case, that is the other two bonds which were not the subject-matter of the former suit in the Munsif's Court, the answer is clear. I hold that those bonds did not in that suit constitute a "matter directly and substantially in issue," within the meaning of s. 13 of the Code, although they were discussed as a matter of evidence; and that even if they were "directly and substantially in issue," I should say that the finding of the Munsif would not support the plea of *res judicata*, because the Munsif was not a Court of jurisdiction competent to try the present suit in which the plea has been raised.

I am, therefore, of opinion that the present suit, so far as it relates to the two bonds which formed the subject of adjudication in the former suit, is barred by the rule of *res judicata*, and the rest of it is not so barred.

DUTHOIT, J., concurred in holding that the suit was *res judicata* only in respect of the bonds on which the former suit was brought.

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December 13.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

TOTA RAM (DECREE-HOLDER) *v.* KHUB CHAND (PURCHASER).*

Execution of decree—Sale in execution—Order disallowing objections to sale—Order confirming sale—Appeal—Civil Procedure Code, ss. 311, 312, 313, 314, 588 (16).

Per PETHERAM, C. J., and OLDFIELD, BRODHURST, and DUTHOIT, JJ.—An order passed under the first clause of s. 312 of the Civil Procedure Code, after an objection made under the provisions of s. 311 has been disallowed, is appealable under art. (16) of s. 588.

Per MAHMOOD, J.—An application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale, the order must be regarded as an order "refusing to set aside a sale of immoveable property" under the first paragraph of s. 312, and therefore appealable as falling under the purview of art. (16) of s. 588.

Lalman v. *Rassu Lal* (1) and *Rajan Kuar* v. *Lalta Prasad* (2) dissented from by MAHMOOD, J.

THIS was a reference to the Full Bench by Mahmood and Duthoit, JJ. It arose out of the following facts. A decree-holder,

* First Appeal No. 26 of 1884, from an order of Pandit Kashi Narain, Munsif of Etawah, dated the 18th December, 1883.

(1) Weekly Notes, 1882, p. 117. (2) Weekly Notes, 1883, p. 178