

Before Mr. Justice Banerji and Mr. Justice Tudball.

BENI MADHO AND ANOTHER (DEFENDANTS) v. INDAR SAHAI (PLAINTIFF)
AND OTHERS (DEFENDANTS).*

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July 27.

*Civil Procedure Code (1908), section 11—Res judicata—“Former suit”—
Application of rule of res judicata unaffected by the question in which
court an appeal lies.*

The rule of *res judicata*, so far as it relates to the retrial of an issue, refers not to the date of the commencement of the litigation but to the date when the Court is called upon to decide the issue. *Balbishan v. Kishan Lal* (1) followed.

Held also that it is the competency of the Court of first instance to entertain the two suits which regulates the application of the rule of *res judicata*: the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule.

THE facts of this case were as follows :—

On the 15th of November, 1899, a lease was granted by Indar Sahai, plaintiff, who is the zamindar of the village, to Ajudhia Prasad and Mathura Prasad, the predecessors in title of the appellants. The lessees, alleging that they had been dispossessed, brought a suit for recovery of possession and compensation, and obtained a decree on the 25th of March, 1903. They obtained formal possession on the 4th of September, 1903, but were again dispossessed, and thereupon they brought another suit on the 4th of March, 1904, for recovery of possession and compensation. This suit was decreed by the Court of first instance on the 30th of September, 1904, and the decree was affirmed in appeal. Possession was delivered on the 19th of November, 1905. On the 4th of December, 1905, the lessor brought the suit which has given rise to this appeal, against the lessees for arrears of rent for the period from the 5th of March, 1904, to the 19th of November, 1905. On the 3rd of January, 1906, the lessees brought another suit for compensation for the same period, that is, for the period subsequent to the date of the institution of the suit brought by them on the 4th of March, 1904, to the date of delivery of possession, namely, the 19th of November, 1905. This suit was decreed by the Court of first instance, on the 5th of June, 1906. Indar Sahai appealed against this decree to the Commissioner, but his appeal was finally dismissed. The Court of first instance

* Second Appeal No. 1104 of 1908, from a decree of C. D. Steel, District Judge of Shahjahanpur, dated the 29th of July 1908, reversing a decree of Jagmohan Nath, Assistant Collector, first class, of Shahjahanpur, dated the 5th of June 1906.

(1) (1888) I. L. R., 11 All., 148.

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dismissed the suit for arrears of rent brought by the lessor, holding that during the period for which rent was claimed the lessees were out of possession. This finding was in accordance with the result of the litigation which ended in the decree of the 30th of September, 1904. From the decree passed in the suit brought by the lessor an appeal was preferred to the District Judge. The appeal prevailed and the suit of the plaintiff lessor was decreed. Upon second appeal to this Court the decision of the lower appellate Court was set aside and the case was remanded to that Court. After remand the learned Judge adhered to his original decision and decreed the claim of the lessor. The defendants (lessees) appealed to the High Court.

Mr. B. E. O'Connor and Munshi *Haribans Sahai*, for the appellants.

Munshi *Govind Prasad*, for the respondents.

BANERJI and TUDBALL, JJ. :—The question in this appeal is whether the suit of the plaintiff respondent is barred by the rule of *res judicata*. The facts are these :—On the 15th of November, 1899, a lease was granted by Indar Sahai, plaintiff, who is the zamindar of the village, to Ajudhia Prasad and Mathura Prasad, the predecessors in title of the appellants. The lessees alleging that they had been dispossessed, brought a suit for recovery of possession and compensation, and obtained a decree on the 25th of March, 1903. They obtained formal possession on the 4th of September, 1903, but were again dispossessed, and thereupon they brought another suit on the 4th of March, 1904, for recovery of possession and compensation. This suit was decreed by the Court of first instance on the 30th of September, 1904, and the decree was affirmed in appeal. Possession was delivered on the 19th of November, 1905. On the 4th of December, 1905, the lessor brought the suit which has given rise to this appeal, against the lessees for arrears of rent for the period from the 5th of March, 1904, to the 19th of November, 1905. On the 3rd of January, 1906, the lessees brought another suit for compensation for the same period, that is for the period subsequent to the date of the institution of the suit brought by them on the 4th of March, 1904, to the date of delivery of possession, namely the 19th of November, 1905. This suit was decreed by the Court of first

instance on the 5th of June, 1906. Indar Sahai appealed against this decree to the Commissioner, but his appeal was finally dismissed. The Court of first instance dismissed the suit for arrears of rent brought by the lessor, holding that during the period for which rent was claimed the lessees were out of possession. This finding was in accordance with the result of the litigation which ended in the decree of the 30th of September, 1904. From the decree passed in the suit brought by the lessor an appeal was preferred to the District Judge. The appeal prevailed and the suit of the plaintiff lessor was decreed. Upon second appeal to this Court the decision of the lower appellate Court was set aside and the case was remanded to that Court. After remand the learned Judge adhered to his original decision and decreed the claim of the lessor. From this decree the present appeal has been preferred.

It is contended that, as before the decision of the appeal to the lower appellate Court in this case the decree in the suit brought by the lessees had become final, the matter in issue in this case has become *res judicata* in consequence of that decree. This contention is in our judgment well founded. The learned Judge overruled the plea of *res judicata* on the ground that the present suit had been instituted before the institution of the suit of the lessees in which they obtained a decree from the Court of first instance on the 5th of June, 1906, and that therefore the finding in that suit cannot be deemed to be a finding in a former suit and the rule of *res judicata* does not apply.

With this view we are unable to agree. It was held by a Full Bench of this Court in *Balkishan v. Kishan Lal* (1) that the rule of *res judicata*, so far as it relates to the retrial of an issue, "refers, not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue." The Legislature has given effect to this ruling by adding to section 11 of Act No. V of 1908 explanation I—which is as follows:—"The expression 'former suit' shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto." The date of the institution of a suit is therefore immaterial for the operation of the rule of *res judicata*. Mr. Govind Prasad, who appears on behalf of the

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respondents, however, contends that the decision of the Rent Court in the suit of the lessees cannot be *res judicata* in the present suit, because in the present suit an appeal lay to the District Judge, whereas an appeal in the other suit lay to the Commissioner. He has cited no authority in support of his contention. In our judgment the fact that an appeal lay to the Civil Court from the decision of the Revenue Court in one of the suits and to the Commissioner in the other cannot affect the question of *res judicata*. It is the competency of the court of first instance to entertain the two suits which regulates the application of the rule of *res judicata*. The court of first instance, which was the Revenue Court, was competent to entertain both the suits which were tried by it and to adjudicate on the issues which arose in those suits. It held in one suit, on the issue whether the lessees, present appellants, were or were not in possession during the period for which compensation was claimed, that they were not in possession. That decision having become final, the same issue could not be re-opened in the other suit which the same court was also competent to try. That the application of the rule of *res judicata* is irrespective of any provisions as to the right of appeal from the decision of the Court which decided the issue is manifest from the second explanation to section 11 of the new Code of Civil Procedure, which settles conflicting authorities on the point. We are therefore of opinion that, as the issue which arises in this suit as to the possession of the appellants during the period for which arrears of rent are claimed was determined by a Court of competent jurisdiction and was decided against the plaintiffs, the matter has become *res judicata* and the same question could not be raised and reconsidered in the present suit. The learned Judge was therefore wrong in overruling the plea of *res judicata*. We allow the appeal and setting aside the decree of the lower appellate Court restore that of the Court of first instance with costs in all Courts.

. *Appeal decreed.*