APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

1888 *December 3.*

ABDUL MAJID (PLAINTIFF) *v.* JEW NARAIN MAHTO AND OTHERS (DEFENDANTS).*

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13.

The decision of an issue in one of two suits tried together, which is not appealed against, cannot be treated as *res judicata* so far as the same issue is concerned in an appeal from the decision in the other suit.

A, a *ticcadar* sued *B* for rent in respect of a holding in the *ticca*. In that suit *B* pleaded that he was a partner of *A* in the *ticca* transaction, and that no rent was due from him in consequence thereof. *B* then sued *A* for an account of the partnership in the same transaction and *A* in that suit denied the partnership. Both suits were heard together by the Munsiff who held *A* was not a partner. *B* appealed against the judgment and decree in the account suit, but did not appeal against that in the rent suit. It was contended on the appeal that the question as to whether *B* was or was not a partner was *res judicata*, by reason of the decision in the rent suit not being appealed against and having become binding.

Held, that s. 13 of the Code of Civil Procedure did not apply, and that the question was not *res judicata*. There was no bar at the time the issue was tried and decided by the Munsiff, and the Appellate Court was bound to decide the appeal upon the evidence.

THE plaintiff instituted this suit against the defendant Jew Narain Mahto and others for an account of a certain *ticca* transaction, alleging that he was a partner with the defendants therein; that the defendants had been managing and collecting the rents on behalf of the partnership and had not rendered him any account or paid him his share of the rent; and that they denied his right thereto. In the suit the defendants denied that the plaintiff was a co-partner, and contended that on this account the suit should be dismissed.

Prior to the institution of the suit Jew Narain and his co-defendants had instituted a suit against the plaintiff for rent, alleging that they were the *ticcadars*; that the plaintiff was a tenant of a portion of the *ticca* property, and was liable to pay rent to them; and that rent was due from him to them.

* Appeal from Appellate Decree, No. 2394 of 1887, against the decree of Baboo Troylokya Nath Mitter, Subordinate Judge of Patna, dated the 29th of July 1887, affirming the decree of Baboo Purno Chunder Ghose, Munsiff of Patna, dated the 24th of March 1887.

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In that suit Abdul Majid pleaded, *inter alia*, that he was a partner of the defendants in the *ticca*.

The issues in the present suit were settled on the 20th September 1886, and in the rent suit on the 14th June 1887, and the question, as to whether the plaintiff was or was not a partner was raised in both suits. The two suits were tried together by the Munsiff, the evidence taken in one suit being treated by the consent of parties as evidence in the other. In the rent suit the Munsiff gave judgment, holding that the plaintiff was not a partner in the *ticca* transaction, and in this suit his judgment was to the effect that for the reasons given in his judgment in the rent suit, he held that the plaintiff was not a partner, and consequently it was unnecessary to try the other issues in the suit. He accordingly dismissed the suit with costs.

Against the Munsiff's decree in the rent suit no appeal was preferred, but the plaintiff appealed against the decree in this suit. When the appeal came on to be heard before the Subordinate Judge, a preliminary objection was raised on behalf of the defendants, that, because the plaintiff had not appealed against the decision in the rent suit, the question as to whether he was a partner or not, was *res judicata*, and that the appeal should, therefore, be forthwith dismissed.

This view was accepted by the Subordinate Judge, and the plaintiff's appeal was dismissed on that ground.

The plaintiff then appealed to the High Court, and on the appeal first coming on to be heard the case was remanded to the Subordinate Judge, in order that he might arrive at a finding upon the evidence as to whether the plaintiff was a partner or not, the question of *res judicata* being reserved for determination after the judgment of the Lower Appellate Court on the facts had been given.

On the remand the Subordinate Judge held that the plaintiff had proved his allegation that he was a partner, and the appeal now came on to be heard before the High Court.

Baboo *Saligram Sing* for the appellant.

Mr. *C. Gregory* and *Munshi Mahomed Yusoof* for the respondents.

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The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The plaintiff in this case brought a suit against Jew Narain Mahto and others for an account in regard to his share in a certain *ticca* transaction; his allegation being that he was a partner with the defendants in that *ticca*. It appears that these defendants had brought against him a suit for rent alleging that they were the sole *ticcadars*, and that he, the plaintiff in this case, that is Abdul Majid, as a tenant of a portion of the *ticca* property, was liable to pay rent.

In that suit Abdul Majid, the plaintiff in this suit, amongst other things, pleaded that no suit for rent would lie against him, as he was a partner in the *ticca*. It is thus clear that the issue whether the plaintiff in this suit, Abdul Majid, was a partner in the *ticca* with the defendants or not, was common in these two suits. Evidence was taken in these two suits bearing upon this issue, and it seems that by consent of the parties the evidence taken in one suit upon this issue was considered as evidence in the other. The Court of first instance decided this issue against the appellant before us, that is to say, it came to the conclusion that he was not a partner in the *ticca* with the defendants. Against the decree for rent, which was passed against the appellant, he did not prefer any appeal, but against the decree which was made in the suit for an account, that is to say against the order of the Munsiff dismissing Abdul Majid's suit, there was an appeal preferred. On the appeal the first question that had to be decided by the Appellate Court was whether the appellant Abdul Majid was a partner with the defendants in the *ticca* transaction or not, and it was contended on behalf of the defendants before the Lower Appellate Court that that question was no longer open between the parties, and that it could not be decided in the Appellate Court on the evidence, because the matter was *res judicata*. That contention rested upon the ground that as the same question had been decided between the parties in the rent suit, and as against the decision in the rent suit no appeal was preferred, that decision, so far as this question of partnership is concerned, is final between the parties in the present suit for an account. The Subordinate Judge of Patna,

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Baboo Troylokya Nath Mitter, who heard that appeal, was of opinion that the contention of the respondents was right, and he dismissed the appeal, not on the ground that upon the evidence the plaintiffs' allegation of co-partnership was not made out, but on the ground that the matter as contended for by the pleader for the respondents was *res judicata* between the parties. On second appeal this question was raised, *viz.*, whether the view taken by the Lower Appellate Court was correct or not, and the record was sent back to the Lower Appellate Court to decide this issue, *viz.*, whether the appellant was a partner or not upon the evidence, reserving the question of *res judicata* on that occasion. If the decision of the Appellate Court upon the evidence had been in favour of the defendants the question of law, *viz.*, whether the decision in the rent suit upon the question of partnership was *res judicata* or not, would not have arisen; but on remand the Lower Appellate Court has found upon the evidence on the record, that the allegation of the appellant, that he was a partner in the *ticca* transaction with the defendants, was established. We have, therefore, now to decide the question of *res judicata* in this case.

We are of opinion that the Subordinate Judge, Babu Troylokya Nath Mitter, was not right in dismissing the appeal, and the appellant's suit upon the ground that it was barred by s. 13 of the Civil Procedure Code. Section 13 says that 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 claim. Now the suit for an account was not brought on the same cause of action as the suit for rent. What was contended for was that the issue as to partnership could not be decided on the evidence by the Appellate Court because that issue had been decided against the appellant in the Munsiff's Court in the rent suit, and no appeal had been preferred against the decision of the Munsiff in that suit. Now s. 13 says that no Court shall try any issue which has been directly and substantially in issue in a former suit between the same parties. I omit the word "suit," because the question whether the present suit ucold be decided does not arise. Now in this case we know that

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that issue was tried by the Court of first instance. There was no bar at the time under s. 13, because at that time that issue had not been tried and decided, and therefore could be no bar under s. 13 when the trial was held in the Court of first instance. That being so, and the first Court having decided the case on the evidence, we are of opinion that the Appellate Court was bound to decide the appeal also upon the evidence. That Court was not holding a trial of the issue, and therefore s. 13 could not apply. The Subordinate Judge was deciding the suit in appeal, the issue having been already tried in the Court of first instance; and therefore the words of s. 13 do not warrant the decision of the first Appellate Court to the effect that in that Court the matter was not open between the parties. Nor on general principles do we think that the view taken by the Lower Appellate Court can be supported. The Court of first instance tried the two suits together, and upon the evidence taken in both, the evidence taken in the one suit being considered as evidence taken in the other by consent of the parties, and came to a certain conclusion. The appellant before us, who was plaintiff in one of the suits and defendant in the other, did not think it worth his while to appeal in one of these suits, but he did appeal against the conclusion at which the Lower Court had arrived in the other suit, and we do not see any valid reason why the appellant should be deprived of his right to have the opinion of the Appellate Court on a question which had been considered and decided by the Court of first instance. We are, therefore, of opinion that s. 13 was not a bar to the Appellate Court's deciding the point on the evidence, and as that Court has decided in favour of the appellant, that he was a partner in the *tioca* transaction, the case will now go back to the Munsiff to dispose of it and try all the remaining issues arising in the case. The costs of this appeal will be costs in the cause, and will abide the final result.

H. T. H.

Appeal allowed and case remanded.