FULL BENCH.

1881
July 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, and Mr. Justice Duthoit.

MUHAMMAD ISMAIL (PLAINTIFF) *v.* CHATTAR SINGH AND ANOTHER (DEFENDANTS) *

Res judicata—Act X of 1877 (Civil Procedure Code), ss. 13, 542—Plea taken for the first time in second appeal.

Held that not only may the plea of *res judicata*, though not taken in the memorandum of appeal, be entertained in second appeal, under the provisions of s. 542 of Act X of 1877, but that even when such plea has not been urged in either of the lower Courts, or in the memorandum of appeal, if raised in the second appeal, it must be considered and determined either upon the record as it stands, or after a remand for findings of fact.

AT the hearing of this second appeal an objection was taken for the first time on behalf of the appellant (plaintiff) that the matter in issue between the parties was *res judicata*. On behalf of the respondents it was contended that it was too late to take such objection, and the judgment of the Court (Straight, J., and Tyrrell, J.) in Second Appeal No. 1143 of 1880 (1) was cited in support of this contention. The Division Court hearing this appeal (Stuart, C. J., and Duthoit, J.), having regard to the judgment cited, referred the question raised by the respondent's contention to the Full Bench. The order of reference was as follows :—

ORDER of REFERENCE.—The plea of *res judicata* is raised before us in this second appeal for the first time; and we observe that another Division Bench of the Court (Straight and Tyrrell, JJ.) have held that such a plea, when not taken in the lower appellate Court, may not be heard in this Court in second appeal. But as we doubt the soundness of that ruling, we refer the question to the Full Bench of the Court. Ss. 542, 582 and 587 of the Code of Procedure all appear to bear on the question. Indeed, s. 542 read in connection with the other sections, appears to us to imply that such a plea as that of *res judicata*, being in our opinion a "ground of objection" within the meaning of that section, may, with leave

* Second Appeal, No. 1311 of 1880, from a decree of G. L. Lang, Esq., Judge of Aligarh, dated the 26th August, 1880, reversing a decree of Sayyid Zahur Husain, Munsif of Koel, dated the 27th April, 1880.

(1) Decided the 16th May, 1881, not reported.

1881

MUHAMMAD ISMAIL v. CHATTAR SINGH.

of the Court, be taken in second appeal; and we are inclined to think that such leave may be given either expressly or by the plea being tacitly allowed to be stated and argued.

Mr. *Siraj-ud-din* and Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambhar Nath* and Lala *Harkishen Das*, for the respondents.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—I am very glad to find that Mr. Justice Duthoit and I mistook the ruling of our colleagues, Straight, J., and Tyrrell, J., to which we adverted in our referring order. As that ruling appeared to us to be expressed we were afraid that our colleagues had recorded the opinion which we attributed to them, but in which we felt great difficulty in concurring. My opinion distinctly was and is that the plea of *res judicata* can certainly be taken in second appeal, either by the pleas in appeal, or orally before us, and for the first time, and at any stage, or after remand. Such is the necessary effect of the provisions of the Code mentioned in the order of reference, *viz.*, ss. 542,582, and 587. But at the same time I must repeat the opinion, which I have so often expressed from the Bench in other cases, that this plea of *res judicata* is utterly unsuited to the great mass of litigation of this country; and that in shutting the mouth of a plaintiff or defendant because in a former suit between the same parties, or parties in the same right, the matter of the plea might therein have been urged and adjudicated upon, but was inadvertently omitted from consideration by, it may be, a poor litigant in ignorance of his rights, or by his local pleader not less ignorant of his law, or by a Court not very intelligent as to either, the policy of the law is mistaken, and I am convinced often leads to gross injustice. But having regard to the law as it stands, and particularly to the provisions of s. 13, Act X of 1877, the plea may be taken, and in all suits and in all appeals. To the remark, however, that this plea not only goes to the root of the case, but "to the jurisdiction of the Court," I must demur. It no doubt destroys the coercive authority of the Court in the particular case in which it is raised and allowed, but in no other sense does it go to the jurisdiction of the Court itself,

and the very fact that it is submitted actually to the judgment of the Court in which it is raised is sufficient to show that, so far as the merits of the case are concerned, the Court has, and would have had, jurisdiction, but for the plea.

STRAIGHT, J. (TYRRELL, J. concurring):—This reference to the Full Bench would seem to have been made by the learned Chief Justice and Duthoit, J., under a misconception of the meaning of a passage in a judgment delivered by us in Second Appeal No. 1143 of 1880 (1). We think it right to take this opportunity of saying we had no intention whatever of ruling that the objection of *res judicata* cannot be raised for the first time in special appeal, nor do our remarks, when examined with the context, appear to bear any such construction.

In reply to the reference we would say that in our opinion not only may the point of *res judicata*, though not taken in the memorandum of appeal, be entertained by this Court in second appeal under the provisions of s. 542 of the Civil Procedure Code, but that even when it has not been urged in either of the lower Courts, or in the pleas in appeal, if raised in this Court, it must be considered and determined, either upon the record as it stands or after a remand for findings of fact. For the objection is one which seems to us to go to the very root of the case, and to the jurisdiction of the Court, and if established is an absolute bar to the suit. The words of s. 13, which by the way figures in the Chapter relating to jurisdiction, are imperative: "No Court shall try any suit or issue;" and a prior final judgment *inter partes* of a Court of competent jurisdiction upon a matter or matters, directly and substantially in issue between them, is a positive bar to a subsequent suit between the same parties in respect of such matter or matters. It is obvious that the practice is inconvenient to allow new objections to be raised in special appeal for the first time. But it is difficult to see how this Court can properly avoid taking notice of objections which assail the plaintiff's right to come into Court at all, or the competency of the defendant to raise matters by way of defence which have been already litigated and determined between the parties. We think, therefore, that it was competent

(1) Decided the 16th May, 1881, not reported.

1881

MUHAMMAD ISMAIL v. CHATTAR SINGH.

for the Division Bench which made this reference to permit the appellant before them to raise the objection of *res judicata*, though taken for the first time, of course always subject to sufficient opportunity being afforded the respondent of meeting such plea.

DUTHOIT, J.—I concur entirely (upon the grounds stated by my honorable colleagues, Straight and Tyrrell, JJ.,) in the opinion that a plea of *res judicata*, though not taken in the memorandum of appeal, may be entertained by this Court in second appeal, and that even when it has not been urged in either of the lower Courts, it must be heard and determined in this Court, either upon the record as it stands, or after a remand for findings of fact.

APPELLATE CIVIL.

1881
July 13.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

THE COLLECTOR OF SHÁHJAHÁNPUR MANAGER OF THE ESTATE OF RAJA JAGAN NÁTH SINGH (DECREE-HOLDER) *v.* SURJAN SINGH AND ANOTHER (JUDGMENT-DEBTORS)*

Execution of decree—Application by one of two joint decree-holders for part execution of joint decree—Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 179—*Act X of* 1877 (*Civil Procedure Code*), *s.* 231.

A decree passed jointly in favour of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder.

Held, therefore, where one of two persons in whose favour a decree for money had been passed jointly applied on the 27th April, 1880, for execution of a moiety of such decree, and the other of such persons made a similar application on the 30th April, 1880, that such applications, not being made in accordance with law, were not sufficient to keep the decree in force.

Also that the illegality of such applications could not be cured by a subsequent amended application for the execution of the decree as a whole preferred after the period of limitation had expired.

ON the 14th April, 1873, Sewa Ram and Bhajan Lal obtained against Chattar Singh and Surjan Singh a joint decree for Rs. 1,717-7-6. Execution of this decree was taken out in 1877,

* Second Appeal, No. 16 of 1881, from an order of W. Duthoit, Esq., Judge of Sháhjahánpur, dated the 13th November, 1880, reversing an order of Maulvi Zain-ul-Abdin, Subordinate Judge of Sháhjahánpur, dated the 31st July, 1880.